(30,381)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 418

JAMES C. DAVIS, DIRECTOR GENERAL AND AGENT, ETC., PETITIONER,

vs.

JOHN L. ROPER LUMBER COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS FOR THE STATE OF VIRGINIA

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 23, 1924

[fol. 1] **IN SUPREME COURT OF APPEALS OF VIRGINIA, AT RICHMOND**

JAMES C. DAVIS, Director General of Railroads and Agent under Section 206 of the Transportation Act of 1920 (Norfolk-Southern Railroad Division), Plaintiff in Error (Defendant Below),

vs.

JOHN L. ROPER LUMBER COMPANY, a Corporation, Defendant in Error (Plaintiff Below)

PETITION FOR WRIT OF ERROR

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

The petitioner is aggrieved by a judgment of the Court of Law and Chancery of the City of Norfolk, entered on the 10th day of August, 1921, against the petitioner, wherein the court overruled the petitioner's motion for a new trial and in arrest of judgment, and entered judgment in favor of the defendant in error against petitioner for the sum of $1,046.88, with interest from July 15, 1918, and costs; the court having tried the case without jury on the 19th day of July, 1921, and having then adjudged that the defendant in error and plaintiff below do recover of the petitioner and defendant below the said amount.

A transcript of the record is herewith filed.

For the sake of simplicity, and to avoid confusion, the parties will be designated in this petition as plaintiff and defendant, in accordance with their positions in the trial court, the defendant below being the petitioner and plaintiff in error, and the plaintiff below being the defendant in error.

[fol. 2] I. Assignment of Errors

1. The court erred in overruling the defendant's motion for a new trial and in arrest of judgment, and in entering judgment against the defendant. (R. 4 and 9.)

2. The court erred in holding that the plaintiff was entitled to recover against the defendant on the claim in suit without having given notice of said claim in writing to the carrier at the point of delivery or at the point of origin within six months after delivery of the property, or within six months after a reasonable time for delivery, in accordance with the terms of the bill of lading.

3. The court erred in holding that the circumstances of the case brought the plaintiff within the terms of the Cummins Amendment to Section 20 of the Interstate Commerce Act excusing, under certain conditions, notice and filing of claim as a condition precedent to recovery.

II. Statement

The case was tried wholly upon an agreed statement of facts. This statement is found in the record at pages 4 to 6, inclusive. No better statement of the facts could be here made, and it would be a vain thing to lengthen this petition by repeating here the agreed statement. Therefore, the court is referred to same at the pages mentioned above for a complete statement of the case.

III. Proceedings

The pleadings consist of a notice of motion for judgment found at pages 1 to 3, inclusive, with acceptance of service thereon, to which the defendant pleaded the general issue (R. 3).

On July 19, 1921, both parties waived jury, the court proceeded to hear the evidence, and try the case, and to render judgment as stated above (R. 4).

Defendant moved for a new trial and in arrest of judgment on July 20, 1920, and on August 10, 1921, the court overruled said motion and entered final judgment as aforesaid.

[fol. 3]

IV. Argument

It appears from the facts as agreed that the defendant admits wrongful delivery at destinations, and the plaintiff admits that no claim was filed within six months. The only question before the court is the legal question whether the provisions of Section 20 of the Interstate Commerce Act in force at the time excused the plaintiff from filing claim within the time provided under the bill of lading.

The third paragraph of Section 3 of the bill of lading conditions was the following language (R. 9):

"Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within six months after delivery of the property, or in case of failure to make a delivery, then within six months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable."

The closing sentence of Section 20 of the Interstate Commerce Act, as it read at the time that the alleged cause of action herein accrued, was as follows:

"Provided, however, that if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery. (24 Stat. 386, 34 Stat. 595, 38 Stat. 1196, 39 Stat. 441.)" 8 U. S. Comp. Stat., p. 9291, Sec. 8604.

The plaintiff contends that no notice of claim was required because the case comes within the language "damaged in transit by carelessness or negligence," as found in this statute. It, therefore, becomes

necessary to interpret the meaning of this statute and apply same to the facts of this case. It is obvious that the plaintiff in this case does not complain of loss "due to delay or damage while being loaded or unloaded." We may, therefore, simplify our problem by eliminating that phrase of the Act from consideration. With this elimination, the Act excuses filing of claim "if the loss, damage or injury complained of was due to * * * damaged in transit by carelessness or negligence." At best, the language of this Act is incoherent and almost unintelligible. The English of the sentence defies analysis. [fol. 4] "But" (as said by the court in the Missouri case of Loesch vs. Union, &c., Co., 75 S. W. 621, 625), " courts are often required to discover the meaning of contracts awkwardly expressed." And the same is equally true as to the meaning of statutes.

1. The Plaintiff Was Not Excused from Filing Claim Because the Damage Complained of Was Not Sustained While the Shipment Was "In Transit."

In order for a plaintiff to bring himself within the exception excusing the filing of claim, as provided in the statute under consideration, it is necessary not only that there should have been damage by carelessness or negligence, but that the alleged damage occur in transit.

The plaintiff is not excused from giving notice, because the property was not in transit when the defendant made wrongful delivery without requiring surrender of bill of lading. On the contrary, the property was at destination and transit was completed.

This precise question has been dealt with, and decided in favor of our present contention, by the First Department of the Appellate Division of the Supreme Court of New York (May 2, 1919), in the case of Bell, et al., vs. New York Central R. Co., 175 N. Y. Sup. 712, from which case we quote as follows:

"It will be noted that both the Cummins Amendment and the bill of lading provision make a double classification of claims, to-wit: (1) Those for loss due to delay or damage while being loaded or unloaded, or damaged in transit, which we will call transit claims; and (2) those for loss otherwise sustained, which we will call non-transit claims. The Cummins Amendment permitted the carrier to require as a condition precedent to recovery the filing of a non-transit claim within four months, and in such cases to require suit to be instituted within two years. In the case of transit claims it forbade the carrier to require the filing of claims as a condition precedent to recovery, but authorized a requirement that suit be instituted within two years.

"In the bill of lading provision adopted under the authority of the amendment, we find first the requirement for the filing of a claim in [fol. 5] non-transit cases within four months, which is a condition precedent to recovery. No provision whatever is made limiting the time within which suit may be instituted in the case of non-transit losses where claims are filed. The next sentence has for its purpose the fixing of a two-year limitation for the institution of suit in transit cases, and prescribes the period as two years. It reads:

" 'Suits for recovery of claims for loss or damage, notice of which is not required, and which are not made in writing to the carrier within four months as above specified, shall be instituted only within two years,' etc.

"It is obvious that the claim in suit is within the class which we have called for brevity the transit cases, and that therefore it is one for a loss of which notice is not required, and for which a claim does not have to be filed in writing."

* * * * * * *

"The meaning of the provision in the bill of lading therefore is this: In non-transit cases, notice of claim must be filed with the carrier within four months, as specified, which is a condition precedent to recovery. In such cases, where the notice of claim is filed, the short statute of limitations does not apply. In all other cases, namely, transit loss cases, suit must be instituted within two years."

The New York case was the reverse of the case at bar because it was a transit case; and the case at bar comes within the category of non-transit cases wherein the New York court held filing of claim to be necessary. The only difference between the bills of lading in the two cases is that in the New York case the bill of lading was of a later vintage and had been revised to conform to the terms of the Cummins Amendment. In the case at bar such revision had not been made, but in contemplation of law the Cummins Amendment must be read into the bill of lading.

In the Texas case of Royal Insurance Company vs. Texas, &c., R. Co., 115 S. W. 117, a fire policy on cotton exempted the insurer from liability for fire occurring on open cars in tranist. The court held that cotton on a car stationary at the point of origin was not covered by the policy, and at page 121 defined "intransit" as meaning "literally in course of passing from point to point."

Two other Texas cases deal even more explicitly with this question, and are cited and quoted below.

[fol. 6] Amory Mfg. Co. vs. Gulf, &c., R. Co., 37 S. W. 856, 857:

"Was the cotton, while on the compress platform, 'in transit' within the meaning of the bill of lading? It is contended upon the one side that the words 'in transit' are the equivalent of the words 'in transitu,' and that goods in the hands of a carrier are in transit from the moment of delivery to the carrier until they reach the hands of the consignee. In a sense, the meaning of the two phrases is the same. The one is a literal translation of the other. But, as actually employed, they have a materially different meaning and application. 'In transit' means literally in course of passing from point to point, and such is its common acceptation. Such, also, is the literal meaning of the phrase 'in transitu' but, for the sake of convenience in defining the right of a creditor to stop goods which have been sold but not delivered to an insolvent purchaser, they have been given a broader technical signification. It may be doubted whether the phrase is ever used in our language in any other connection. It

would seem, therefore, that, if the parties to the contract in question had desired to employ a single phrase which would cover the carrier's exemption from liability from the time the goods were received by it until it had delivered them to the consignee, they would have used the more comprehensive terms. Had they done so, a more difficult question would have been presented. But here the words 'in transit,' the words actually used, according to their ordinary signification, apply only to the cotton from the time the transportation was to begin until the time it was to end under the contract. The cotton, not having been set in motion towards its destination, was not in fact in transit; and we cannot hold it constructively in transit while on the platform, without unwarrantably extending the meaning of a well-defined word, and doing violence to a well-established canon of construction."

Gulf, &c. R. Co. vs. Pepperell Mfg. Co., 37 S. W. 965:

"In an action against a railroad company for loss of cotton belonging to plaintiff, it appeared that the cotton was placed on the platform of a compress company to be compressed; that, while it was in possession of such company, on its platform, defendant executed bills of lading, binding itself to transport it; and that it was afterwards burned while on such platform. Held, that such cotton was not 'in depot or place of transshipment,' nor 'in transit,' within a provision in such bill of lading that neither such company nor any connecting carrier, while 'in transit' or while 'in depot or place of transshipment,' etc., should be liable for loss, etc."

[fol. 7] 2. The Case at Bar Comes Within the Category of a Non-delivery Case, as to which the Filing of Claim is Required, Rather Than in That of a Transit Case, as to Which the Filing of Claim is Excused.

By reading the pertinent portion of the Cummins Amendment into the bill of lading provision under consideration, it appears that the statute contemplates transit cases and non-delivery cases. Thus interpreted, wrongful delivery without surrender of bill of lading is not a loss, damage or injury due to delay or damage in transit. On the contrary, the wrongful delivery comes within the bill of lading category of "failure to make delivery."

A similar provision was contained in the bill of lading involved in the case of Blish Milling Co. vs. Railway, 241 U. S. 190, 195. At the time the Blish Milling Company shipment was made, the first Cummins Amendment had not been enacted, nor was there any statutory provision in reference to requirements for giving notice of claim or for filing claims. The facts in the Blish case were substantially identical with the facts here involved. There was a delivery without surrender of the bill of lading. Claimants sought to avoid the effect of the bill of lading provisions by ignoring the contract and suing for a conversion. The court, however, held that notwithstanding the form of the suit, the bill of lading provisions governed and were lawful and enforceable. It was contended that the pro-

vision with reference to failure to make delivery was inapplicable where delivery was made to the wrong party. The court in denying such contention said:

"But 'delivery' must mean delivery as required by the contract, and the terms of the stipulation are comprehensive—fully adequate in their literal and natural meaning to cover all cases where the delivery has not been made as required. When the goods have been misdelivered there is as clearly a 'failure to make delivery' as when the goods have been lost or destroyed; and it is quite as competent in the one case as in the other for the parties to agree upon reasonable notice of the claim as a condition of liability. It may be urged that the carrier is bound to know whether it has delivered to the right person or according to instructions. This argument, however, even with respect to the particular carrier which makes a misdelivery, loses sight of the practical object in view. In fact, the transactions of a railroad company are multitudinous and are car- [fol. 8] ried on through numerous employees of various grades. Ordinarily the managing officers, and those responsible for the settlement and contest of claims, would be without actual knowledge of the facts of a particular transaction. The purpose of the stipulation is not to escape liability but to facilitate prompt investigation. And, to this end, it is a precaution of obvious wisdom, and in no respect repugnant to public policy, that the carrier by its contracts should require reasonable notice of all claims against it even with respect to its own operations."

The first Cummins Amendment recognizes and puts in statutory form this doctrine, limiting it, however, to cases where the loss, damage, or injury is not due to delay or damage while loading or unloading, or in transit, due to carelessness or negligence of the railway company.

(3) It is obvious from the context of the act that filing of claim is excused only in case of damage to the shipment while in transit. If the plaintiff should prevail in the contention that wrongful delivery at destination is covered by the language of the statutory provision under consideration, all of the provisions of the statute as to filing of claim would be nullified. The non-requirement of notice would apply to every conceivable case. That such is not the intent of the statute is plainly shown by reason of the fact that the very clause now under consideration is in itself clearly an exception. The existence of an exception presupposes a general rule outside of the exception. The plaintiff's contention would render the exception so broad as to leave nothing outside of it.

This argument is strengthened, indeed becomes unanswerable, in the light of the provision of the statute immediately preceding the concluding provision we have been considering, which provision is as follows:

"Provided, further, that it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing

of claims for a shorter period than four months, and for the institution of suits than two years."

It is obvious from the language of this provision that Congress has not intended to abolish completely the requirement of filing [fol. 9] claim. And in the case at bar the plaintiff's failure to file claim within six months is in entire accordance with the requirements of these provisions of the statute which have been quoted and considered in this argument.

The plaintiff, having failed to file claim within six months, as required under the bill of lading, cannot recover. The court should enter judgment for the defendant.

V. The Judgment of the Trial Court Should be Reversed and a Judgment in Favor of the Defendant Should be Entered by the Appellate Court.

Wherefore, the petitioner prays that a writ of error without supersedeas be awarded to the judgment of the Court of Law and Chancery of the City of Norfolk aforesaid; that the same may be reviewed and reversed; and a judgment entered in favor of the defendant.

And your petitioner will ever pray, etc.

James C. Davis, Director General of Railroads and Agent under Section 206 of the Transportation Act of 1920, by Hughes, Little & Seawell, His Attorneys.

I, the undersigned, an attorney practicing in the Supreme Court of Appeals of Virginia, do certify that, in my opinion, there is sufficient matter of error in the record accompanying this petition to render it proper that the judgment contained therein should be reviewed by this court.

R. M. Hughes, Jr. Hughes, Little & Seawell, Attorneys. R. M. Hughes, Jr., Solicitor.

Received June 6, 1922. Writ of error awarded. Bond $300.

F. W. Sims.

To the Clerk at Richmond.

Received June 19, 1922. H. S. J.

[fol. 10] IN COURT OF LAW AND CHANCERY

JOHN L. ROPER LUMBER COMPANY, a Corporation, Plaintiff,

vs.

JOHN BARTON PAYNE, Director General of Railroads, Norfolk-Southern Railroad, and as Agent Provided for under Section 206 of the Transportation Act 1920, Defendant.

MOTION FOR JUDGMENT AND NOTICE THEREOF—Filed March 25, 1921

To John Barton Payne, Director General of Railroads, Norfolk Southern Railroad, and as agent provided for under Section 206 of the Transportation Act, 1920:

Take notice that on the 21st day of March, 1921, at the hour of ten o'clock (10:00) A. M. on that day, or so soon thereafter as the matter may be heard, John L. Roper Lumber Company shall move the Court of Law and Chancery for the City of Norfolk, Virginia, for a judgment against you for the sum of One Thousand and Forty-six Dollars and Eighty-eight Cents ($1,046.88), with interest thereon from the 1st day of July, 1918, and the costs of this proceeding the same being due to John L. Roper Lumber Company, by you as follows, to-wit:

Heretofore, to-wit: On the 24th day of June, 1918, John L. Roper Lumber Company delivered to Director General of Railroads, United States Railroad Administration, Norfolk-Southern Railroad, at Newbern, North Carolina, one carload of scrap iron for transportation to Clarksburg, West Virginia, and requested that an order notify bill of lading be issued therefor, and accordingly, the duly authorized Agent of said Director General of Railroads, at New Bern, North Carolina, on the 24th day of June, 1918, issued a bill of lading to said John L. Roper Lumber Company, consigning said car load [fol. 11] of scrap iron to John L. Roper Lumber Company, Clarksburg, West Virginia, notify George Yampolsky, Clarksburg West Virginia, and under and by virtue of the terms of said bill of lading this said shipment was to be delivered only to the lawful holder of said bill of lading, duly endorsed by said John L. Roper Lumber Company, whereas, the said Director General of Railroads, through his duly authorized agent, carelessly and negligently delivered said car load of scrap iron to George Yampolsky or some other person, without surrender of said bill of lading and without the knowledge or consent of John L. Roper Lumber Company and the person to whom said shipment was delivered was not the lawful holder of said bill of lading, the said John L. Roper Lumber Company being the lawful holder of said bill of lading, never having delivered said bill of lading to any other person, and said John L. Roper Lumber Company is now the lawful holder of said bill of lading, the same being in its possession, and the said Director General of Railroads has wholly failed and refused to deliver said shipment to it, and has failed and refused to pay said John L. Roper Lumber Company the

value of said shipment, though often requested so to do, and that on account of the said negligence and carelessness of the said Director General of Railroads, John L. Roper Company has been damaged to the extent of the value of said shipment, in the amount of One Thousand and Forty-six Dollars and Eighty-eight Cents ($1,046.88) together with interest thereon from the 1st day of July, 1918.

John L. Roper Lumber Company, by C. M. Bain, its Counsel.

C. M. Bain, p. q.

Endorsed: Service accepted. John Barton Payne, Director General & Agent, by Hughes, Little & Seawell.

Which motion was accordingly docketed.

[fol. 12] IN COURT OF LAW AND CHANCERY

JUDGMENT—July 19, 1921

This day came the parties by their attorneys and the defendant pleaded not guilty, to which the plaintiff replies generally, and no jury being demanded, the Court proceeded to hear the evidence and try the case. And the evidence being fully heard on an agreed statement of facts it is considered by the Court that the plaintiff recover of the defendant the sum of One Thousand and forty-six dollars and eight-eight cents ($1,046.88) with legal interest thereon from the 15th day of July, 1918, till paid and its costs in this behalf expended.

IN COURT OF LAW AND CHANCERY

AGREED STATEMENT OF FACTS

For the purpose of this action it is agreed that the following facts shall be found by the Court and that judgment shall be rendered thereon as the Court may determine the law therefrom.

In accordance with the Acts of Congress and Proclamations of the President of the United States, the President of the United States of America took possession of the line of railroad of Norfolk-Southern Railroad Company on January 1, 1918, and said line of railroad, in accordance with said Acts of Congress and Proclamations of the President of the United States, was operated by the United States Railroad Administration, and Director General of Railroads, so appointed by the President of the United States, from the 1st day of January, 1918, to and including the 29th day of February, 1920.

That James C. Davis has been appointed Director General of Railroads, and as Agent provided for in Section 206 of the Transportation Act of 1920.

That on the 24th day of June, 1918, John L. Roper Lumber Company delivered to the Agent of Director General of Railroads,

United States Railroad Administration, Norfolk Southern Railroads, at Newbern, North Carolina, one car load of scrap iron for transportation from New Bern, North Carolina, to Clarksburg, West Virginia, and requested that an Order Notify Bill of Lading be issued therefor. Accordingly, the duly authorized Agent of United States Railroad Administration, Director General of Railroads, Norfolk Southern Railroad, at Newbern, North Carolina, on the 24th day of June, 1918, issued to John L. Roper Company a Bill of Lading for said car load of scrap iron, consigning the same to John L. Roper Lumber Company, Clarksburg, West Virginia, notify George Yampolsky, Clarksburg, West Virginia.

[fol. 13] That said Director General of Railroads caused the said car load of scrap iron to be transported from Newbern, North Carolina, to Clarksburg, West Virginia, the Agent of the said Director General of Railroads, at Clarksburg, West Virginia, delivered said shipment to George Yampolsky without surrender of the Original Order Notify Bill of Lading.

That the said shipment was delivered to said George Yampolsky without the knowledge or consent of John L. Roper Lumber Company, and the person to whom the shipment was delivered was not the lawful holder of the said Original Order Notify Bill of Lading. John L. Roper Lumber Company has never delivered the Bill of Lading to any other person and has never endorsed the same, and John L. Roper Lumber Company is now the lawful holder of said Bill of Lading.

The shipment arrived at Clarksburg, West Virginia, on or about the 15th day of July, 1918, and was delivered to George Yampolsky by the Director General of Railroads on or about the 15th day of July, 1918.

No claim in writing to the carrier at point of delivery or at point of origin was filed by John L. Roper Lumber Company until March 5, 1920. A copy of the Bill of Lading issued by Director General of Railroads to John L. Roper Lumber Company, June 24, 1918, is hereto attached as Exhibit "A." The value of said shipment is agreed to be $1,046.88.

C. M. Bain, Attorney for Plaintiff. R. M. Hughes, Jr., Attorney for Defendant.

This 16th day of July, 1921.

Standard Form Order Bill of Lading

Norfolk Southern Railroad Company

Order Bill of Lading—Original

Shipper's No. —. Agent's No. —.

Received, subject to the classification and tariffs in effect on the date of issue of this Original Bill of Lading, at Newbern, N. C., [fol. 14] 6-24-18, 19—, from John L. Roper Lumber Co., the property described below, in apparent good order, except as noted (con-

tents and conditions of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its own line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and acepted for himself and his assigns.

This Bill of aLding is assignable but not negotiable, except in so far as may be required to carry out the promise of the carrier made in the following surrender clause, and is enforceable as provided in Section 10 of this Bill of Lading, according to its original tenor and effect.

The surrender of this Original order Bill of Lading properly endorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is endorsed on this original bill of lading or given in writing by the shipper.

The Rate of Freight from —— to —— is in Cents per 100 Lbs If Times 1st Class. If 1st Class. If 2nd Class. If Rule 25. If 3d Class. If Rule 26. If Rule 28. If 4th Class. If 5th Class. If 6th Class. If Class A. If Class B. If Class C. If Class D. If Class E. If Class H. Per Barrel, If Class F. If Special, per —.

(Mail Address—Not for Purposes of Delivery.)

Consigned to order of John L. Roper Lumber Co., Destination, Clarksburg, State of W. Va., County of ——, Notify Geo. Yampolsky, at Clarksburg, State of W. Va., County of ——, Route N. S. Suffolk N. & W. for B. & O. Del'y. Car Initial, SOU. Car No. 187064.

No. Packages. Description of Articles and Special Marks, Car load scrap iron. No Seals—Gondola. Weight (Subject to Correction). Class or Rate. Check Column.

[fol. 15] If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $— to apply in prepayment of the charges on the property described hereon.

—— ——, Agent or Cashier, per —— ——.

(The signature here acknowledges only the amount prepaid.

Charges advanced: $—.

John L. Roper Lumber Co., rfc. J. P. C. Davis, Agent, per H.

Conditions

Section 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss, damage or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession, the carrier or party in possession shall not be liable for loss, damage or delay occurring while the property is stopped and held in transit upon request of the shipper, owner or party entitled to make such request; or resulting from a defect or vice in the property, or from riots or strikes; or for country damage on cotton. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in [fol. 16] open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars), shall be liable only for negligence.

In case of quarantine the goods may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by guarantine regulations or authorities, or for the carrier's despatch, or at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when goods are so discharged, or goods may be returned by carrier at owner's expense and risk to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to goods shall be borne by the owners of the goods or be a lien thereon. The carriers shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required by quarantine regulations or authorities, even though same may have been done by carrier's officers, crew, agents or employes, nor for detention, loss or damage of any kind occasioned by quarantine or the enforcement thereof.

Sec. 2. In issuing this bill of lading this company agrees to transport only over its own line, and, except as otherwise provided by law, acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law.

Sec. 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable despatch, unless by specific agreement indorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if

such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been [fol. 17] represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within six months after delivery of the property, or in case of failure to make delivery, then within six months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable.

Any carrier or party liable on account of loss or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.

Sec. 4. All property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot or place of delivery of the carrier, or warehouse, subject to reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of [fol. 18] any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges

hereunder, and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Property destined to or taken from a station, wharf or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves or landings, shall be at owner's risk until the cars are attached to and after they are detached from trains, or until loaded into and after unloaded from vessels.

Sec. 6. No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 7. Every party, whether principal or agent, shipping explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 8. The owner or consignee shall pay the freight, and average, if any, and all other lawful charges accruing on said property, and if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 9. Except in case of diversion from rail to water route, which is provided for in Section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations, and exemptions provided by statute and to the conditions contained in this bill of lading not inconsistent with such statutes or this section, and subject also to the condition that no such carrier or party in possession shall be liable for any loss or damage resulting from fire, or for any loss or damage resulting from the perils of the lake, sea [fol. 19] or other waters; or from vermin, leakage, chafing, breakage, heat, frost, wet, explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances, whether existing prior to, at the time of, or after sailing; or unseaworthiness, or from collision, stranding or other accidents of navigation, or from prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have the liberty to call at any port or ports, to tow and be towed, to transfer, to tranship, to lighter, to load and discharge goods at any time, and assist vessels in distress, and to deviate for the purpose of saving life or property. Such water carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry such property upon deck.

The term "water carriage" in this section shall not be construed as

including lighterage across rivers or in lake or other harbors when performed by the rail carrier, and the liability for such lighterage shall be governed by the other sections of this instrument.

Sec. 10. Any alteration, addition or erasure in this bill of lading which shall be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to to its original tenor.

Sec. 11. The terms and conditions of this bill of lading with respect to interstate shipments are subject to the provisions of the Act to Regulate Commerce and the Amendments thereto, including the so-called Cummins Amendment, aid are effective only so far as not inconsistent with such provisions.

E. D. Kyle, Traffic Manager, Norfolk, Va. J. F. Dalton, General Freight Agent, Norfolk, Va.

And afterwards, on the 20th day of July, 1920:

This day came again the defefendant, by his attorney, and thereupon moved for a new trial of the case in which judgment was entered on yesterday, and in arrest of judgment on the ground, that said judgment is contrary to the law and the evidence, the further hearing of which motion is adjourned.

[fols. 20 & 21] And now, on this 10th day of August, 1921:

This day came again the parties by their attorneys and the defendant's motion for a new trial and in arrest of judgment, being fully heard, is overruled, to which action of the Court the defendant excepts and leave is given it to file its exceptions at a future day.

IN COURT OF LAW AND CHANCERY

CLERK'S CERTIFICATE

I, James V. Trehy, Clerk of the Court of Law and Chancery of the City of Norfolk, do hereby certify that the foregoing and annexed is a true transcript of the record in the suit of John L. Roper Lumber Company, a corporation, plaintiff, vs. John Barton Payne, Director General of Railroads, Norfolk Southern Railroad, Defendants, lately pending in said Court.

I further certify that the said copy was not made up and completed until the plaintiff has had due notice of the making of the same and the intention of the defendant to take an appeal therein.

Given under my hand this 6th day of September, 1921.

James V. Trehy, Clerk.

Fee for this record, $10.00.

A copy—teste: H. Stewart Jones, C. C.

[fol. 22] IN SUPREME COURT OF APPEALS

[Title omitted]

Court of Law and Chancery of City of Norfolk

SIMS, J.:

This is an action instituted by notice of motion by the defendant in error, John L. Roper Lumber Company, (hereinafter called plaintiff), against the plaintiff in error, (hereinafter called the defendant), in which the plaintiff, the lawful holder of an order notify bill of lading covering an interstate shipment of property, seeks to recover the value of the property as a liability imposed upon the defendant by the Federal statute, section 20 of the Interstate Commerce Act, as amended by the Carmack and the first and second Cummins Amendments, being the loss or damage occasioned the plaintiff by the negligence of the defendant while the property was in transit, consisting of the wrongful conversion of the property by the negligent delivery of it by the defendant to a third person, without requiring the surrender of the bill of lading.

No jury being demanded, the court below heard the evidence, and tried and decided the case without a jury. The decision and judgment of the court was for the plaintiff for the sum of $1,046.88, the value of the property. It is that judgment which is under review. [fol. 23] The case was heard and decided, as aforesaid, upon the following agreed statement of facts:

"Agreed Statement of Facts"

"For the purpose of this action it is agreed that the following facts shall be found by the Court and that judgment shall be rendered thereon as the Court may determine the law therefrom.

"In accordance with the Acts of Congress and Proclamations of the President of the United States, the President of the United States of America took possession of the line of railroad of Norfolk-Southern Railroad Company on January 1, 1918, and said line of railroad, in accordance with said Acts of Congress and Proclamations of the President of the United States, was operated by the United States Railroad Administration, and Director-General of Railroads, so appointed by the President of the United States, from the 1st day of January, 1918, to and including the 29th day of February 1920.

"That James C. Davis has been appointed Director General of Railroads, and as Agent provided for in section 206 of the Transportation Act of 1920.

"That on the 24th day of June, 1918, John L. Roper Lumber Company delivered to the Agent of Director General of Railroads, [fol. 24] United States Railroad Administration, Norfolk-Southern Railroad, at New Bern, North Carolina, one carload of scrap iron for transportation from New Bern, North Carolina to Clarksburg, West Virginia, and requested that an Order Notify Bill of Lading be issued thereof. Accordingly, the duly authorized Agent of United

States Railroad Administration, Director General of Railroads, Norfolk-Southern Railroad at New Bern, North Carolina, on the 24th day of June, 1918, issued to John L. Roper Company a Bill of Lading for said car load of scrap iron, consigning the same to John L. Roper Lumber Company, Clarksburg, West Virginia, Notify George Yampolsky, Clarksburg, West Virginia.

"That said Director General of Railroads caused the said carload of scrap iron to be transported from New Bern, North Carolina, to Clarksburg, West Virginia, the Agent of the said Director General of Railroads, at Clarksburg, West Virginia, delivered said shipment to George Yampolsky without surrender of the Original Order Notify Bill of Lading.

"That the said shipment was delivered to the said George Yampolsky without the knowledge or consent of John L. Roper Lumber Company, and the person to whom the shipment was delivered was [fol. 25] not the lawful holder of the said original order Notify Bill of Lading. John L. Roper Lumber Company has never delivered the Bill of Lading to any other person and has never endorsed the same, and John L. Roper Lumber Company is now the lawful holder of said Bill of Lading.

"The shipment arrived at Clarksburg, West Virginia, on or about the 15th day of July, 1918, and was delivered to George Yampolsky by the Director General of Railroads on or about the 15th day of July, 1918.

"No claim in writing to the carrier at point of delivery or at point of origin was filed by John L. Roper Lumber Company until March 5, 1920. A copy of the Bill of Lading issued by Director General of Railroads to John L. Roper Lumber Company, June 24, 1918 is hereto attached as Exhibit "A." The value of said shipment is said to be $1,046.88."

The bill of lading referred to in this statement was in evidence and contained the following provision:

"Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within six months after delivery of the property, or in case of failure to make delivery of the property, then within six months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable."

[fol. 26] The aforesaid Federal Statute (8 U. S. Comp. Stat. p. 9291 sec. 8604a) is, so far as material, as follows:

"Any common carrier * * * receiving property for transportation from a point in one state * * * to a point in another state * * * shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property," * * * and * * * shall be liable to the lawful holder of said receipt or bill of lading * * * for the full actual loss, damage, or injury to such property caused by it or by any * * * common carrier * * * to which such property may be delivered or over whose line or lines such property

may pass * * * Provided * * *, that it shall be unlawful for any * * * common carrier to provide by * * * contract * * * or otherwise a shorter period for giving notice of claims than ninety days and for filing of claims for a shorter period than four months, and for the institution of suits than two years: Provided, however, that if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim or filing of claim shall be required as a condition precedent to recovery."

SIMS, P., after making the foregoing statement, delivered the following opinion of the court:

[fol. 27] There is but a single question involved in the decision of this case and that is as follows:

1. In an action to recover the liability imposed upon a common carrier by the Federal Statute, (Section 20 of the Interstate Commerce Act as amended by the Carmack and the first and second Cummins' Amendments), for loss or damage occasioned the plaintiff by the negligence of the carrier, which negligence consists of the negligent misdelivery by the terminal carrier, which occurs at the place of destination and before the contract of carriage is completed, to a third person not entitled to receive it, of property of the plaintiff received by the carrier for interstate transportation, is any contract requirement of notice of claim, or filing of claim for such loss or damage, as a condition precedent to recovery, a valid requirement?

The question must be answered in the negative.

The decision of the question just stated is not free from difficulty. Its final decision will depend, of course, on the ruling of the Supreme Court upon it, but, as yet, there has been no decision of that high tribunal upon the precise question. There have been a few decisions of courts of lesser jurisdiction upon the question, which, however, are not in harmony; and the ascertainment of the proper construc-[fol. 28] tion of the Statute, upon the meaning of which the decision depends, is more than ordinarily difficult because of the phraseology and punctuation of the Statute.

Indeed, in the petition of the defendant for the writ of error in the instant case, this is said: "At best, the language of this Act is incoherent and almost unintelligible. The English of the sentence," (the proviso presently to be particularly mentioned), "defies analysis." And in several of the decisions the same is said in substance. It is manifest, therefore, that no dependable construction of the statute can be derived from the method of giving to its words merely their literal meaning.

For example, the words of that portion of the statute which imposes the liability are that the carrier shall be liable "for any loss, damage, or injury to such property," and, what is the same thing, as stated in another part of the statute, "for the full actual loss,

damage or injury to such property,"—the literal meaning of which is that the only liability imposed by the statute is for loss of, or damage to, or injury to, the whole or some portion of the property itself,—that the liability is so classified that the property itself must be thus affected in order that the liability may exist,—that no liability is imposed for any personal loss or damage suffered by the plaintiff, such as loss of a sale of the property, expense incurred, [fol. 29] or other incidental personal loss or damage not of or to the property itself, although due to the failure of the carrier to perform the contract of carriage in some particular, such as unreasonable delay in the transportation of the property. That is to say, if the literal meaning of the words is to be taken, the classification by the statute of the liability imposed is not of loss or damage to the shipper, but of loss or damage to the property only. But it is settled that such literal construction is not the true construction of the statute. In Norfolk Trucker's Exch. v. Norfolk Co., 116 Va. 466, at p. 466, 9 Va. App. 364 this is said: "We are of opinion that the amendment" (the Carmack Amendment, which contains the language of the statute above quoted, "for any loss, damage, or injury to such property"), " is broad enough to cover a case of damage to the shipper by reason of delay." To the same effect see N. Y. P. & N. R. Co., v. Chandler, 129 Va., 695.

Similarly, when we come to construe the language of the proviso of the statute as to non-requirement of any notice of claim or filing of claim in certain cases,—which is relied on as decisive of the instant case by both the plaintiff and defendant—,we find that we cannot give to certain of its words the literal meaning which they may seem to import.

The proviso of the statute in question is as follows:

[fol. 30] "Provided, however, that if the loss, damage, or injury, complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

The clause in the bill of lading which the court below held, in effect, as forbidden by, and hence invalid under said proviso, in so far as it would otherwise have been applicable to the instant case, is as follows:

"Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within six months after delivery of the property, or in case of failure to make delivery, then within six months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable."

[fol. 31] It will be observed that the period, in which such clause requires the making of claim, is longer than the period within which the statute permits notice or filing of claim to be required as a condition precedent to the right of recovery in any case of liability

under the statute, in which the statute permits any such requirement at all. Therefore, the bill of lading is not in conflict with the statute so far as the length of the period mentioned is concerned.

This is a case of failure to make delivery, in accordance with the contract of carriage, of the property received by the carrier for interstate transportation, because of the negligent misdelivery of such property by the terminal carrier, which occurred at the place of destination, but before the contract of carriage was completed, and no claim was made in writing to the carrier at the point of delivery or at the point of origin within six months after a reasonable time for delivery had elapsed, as undertaken to be required by the aforesaid clause in the bill of lading.

One of the positions taken in argument for the defendant is that this is a case of total loss of the property; that it cannot be contended that it falls within any of the provisions of the aforesaid proviso of the statute other than "damaged in transit by carelessness or negligence;" and that the word "damaged" as there used has reference solely to "loss * * * complained of * * * due to * * *" (damage or injury to the property while the [fol. 32] property is) "in transit, by carelessness or negligence;" and does not embrace "loss * * * complained of * * * due to * * *" (damage or injury to the shipper while the property is) "in transit, by carelessness or negligence;" and the following decisions of State courts, cited and relied on for the defendant, do hold that cases of total loss of the property are not embraced in the said proviso. Henninger Produce Co. v. American Ry. Express Co., (Minn.), 188 N. W. 272; Conover v. Railway, 212 Ill. App. 29; and St. Sing et al. v. American Express Co., (N. C.), 111 S. D. 710. But these cases rest wholly upon the position that the literal meaning of the words of the proviso must be given to them. As we have seen, such a rule of interpretation cannot be relied on in the interpretation of this statute.

In Henninger Produce Co. v. American Ry. Express Co., the aforesaid holding was indeed *obiter, as* there was no finding of negligence on the part of the carrier in that case. The opinion of the court in that case says this: "* * * Its (the plaintiff's) argument is that the merchandise was lost in transit, and by negligence, and therefore the limitation" (the requirement in the bill of lading of claim to be made within four months after a reasonable time for delivery), "does not apply. We are unable to take this view. *The* [fol. 33] *language of the statute is plain.* It was found by the court that the butter 'was lost in transit and was not and has never been delivered.' *There was no finding on negligence.* Even where merchandise is lost in transit by negligence *the language of the Cummins Amendment* does not dispense with the making of a claim. *We are not* cited a case entirely controlling upon this point. Conover v. Railroad, 212 Ill. App. 29, bears upon it." (Italics supplied.)

In the Conover case, referred to in the opinion just mentioned and also supra, (212 Ill. App. 29), the court cites no authority and rests its holding solely on the words of the proviso, without stating any reasons therefor. All that the court says in its holding on the

subject in the Conover Case is this: "loss of grain from a car cannot reasonably be included in the exemption of loss, damage or injury * * * due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence."

In St. Sing et al. v. American Express Co., supra, (111 S. E. 710), the property was never delivered to the consignee at destination because, in the usual course taken with non-delivered parcels, it was sent to another point and there sold by the terminal carrier as unclaimed goods. The court in its opinion said this: "This being an interstate shipment, the Federal statutes applicable and the au- [fol. 34] thoritative decisions thereon afford the exclusive rule of liability on these cases, and by them it is clearly recognized that a rule requiring that the party aggrieved by breach of contract of carriage and as condition precedent to recovery, shall file with the company a written claim of his damages within four months * * * after a reasonable time for delivery has elapsed, is reasonable and valid." Citing Texas etc. R. Co. v. Leatherwood, 250 U. S. 478, 39 Sup. Ct. 517, 63 L. Ed. 1096; Georgia etc. Ry. Co. v. Blish Milling Co., 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948; Taft v. Railroad, 174 N. C. 211, 93 S. E. 752; Phillips v. Railroad, 172 N. C. 86, 89 S. E. 1057; and Mann v. Transportation Co., 176 N. C. 104, 105, 96 S. E. 731.

An examination of the last mentioned decisions discloses that they all involve cases which arose prior to the first Cummins amendment, when the statute in question contained only the Carmack Amendment—when it did not contain the aforesaid proviso—with the single exception of the case of Mann v. Transportation Co.; and the holding of the latter case seems to me to be directly contrary to the aforesaid holding in the St. Sing case for which it is cited.

In Mann v. Transportation Co., the case arose under and was [fol. 35] controlled by the first Cummins Amendment, which contained the aforesaid proviso. It involved an interstate shipment of hogs. The shipment was received at destination "one of the hogs missing, and four died and the others in a greatly damaged condition. This incident to the wrongful delay and negligence of the transportation." There was in the bill of lading precisely the same clause with respect to requiring claim to be made in writing within four months of delivery of the property, or, in case of failure to make delivery, within four months after a reasonable time for delivery had elapsed, and providing that unless the claims were so made the carrier should not be liable. The plaintiff shipper made no claim in writing within the four months after the delivery of the property which was delivered, or within four months after a reasonable time for delivery of the property which was not delivered, had elapsed. There was a special verdict finding that the "*plaintiff*" was "injured *by damage* done to his hogs by the negligence of the defendant's connecting carriers." (Italics supplied.) Because of such failure of the plaintiff to make such claims within such time, as required by the bill of lading, the trial court entered judgment for the defendant, the transportation company. The appellate court reversed the case and in the opinion of the court, (175 N. C. at p. 107) this is said:

[fol. 36] "* * * the last clause of this amendatory act" (referring to the aforesaid proviso) "provides that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice nor filing of claim shall be required as a condition precedent to recovery.

"The verdict having established that the loss and damage complained of in the present instance was caused by the negligence of the connecting carrier, the plaintiff's claim comes clearly within the express terms of the statute, and defendant is thereby deprived of any defense which might arise from failure of plaintiff to give the notice."

It will be observed that the North Carolina court, in the case just mentioned, did not take the view that the aforesaid proviso is confined in its application to cases of loss, damage or injury due to damage or injury to the property itself, which is the construction contended for in argument for the defendant in the instant case; but construed the proviso as embracing injury to the plaintiff shipper, consisting of loss, as well as damage, suffered by him personally, when caused by the negligence of the carrier in the performance of the contract of carriage. That is to say, the holding, in [fol. 37] effect, is that the aforesaid proviso embraces all cases of liability for personal loss occasioned the plaintiff shipper, by non-delivery due to negligence in the performance of the contract of carriage, as well as cases of liability for personal loss or damage to the plaintiff shipper due to damage to the property itself while in transit, and that the application of the proviso is not confined to cases of damage to the property itself while in transit. In other words, the holding of the decision under consideration is, in effect, that the proviso when read along with the residue of the statute, forbids any common carrier, by contract provision in the bill of lading or otherwise, to require any notice of claim or filing of claim as a condition precedent to recovery upon any liability imposed by the aforesaid Federal statute where the personal loss, damage or injury complained of is due to negligence in the performance of the contract of carriage,—leaving the carrier free to require, by contract provision in the bill of lading, notice of claim within not less than ninety days and filing of claim within not less than four months, and for the institution of suits within two years, from the time the cause of action may have arisen, as a condition precedent to recovery, upon any liability imposed by the statute in all cases where the personal loss, damage or injury complained of is not due to [fol. 38] negligence in the performance of the contract of carriage, but is of the character of liability imposed by the statute which rests upon the obligation of the carrier as an insurer.

If such is the correct construction of the proviso—and we think that it is—the statute as a whole classifies claims thereunder, of which notice of or filing can, or cannot, be required as a condition precedent to recovery, into two kinds and only two, which together embrace all claims for which liability is imposed by the statute,

namely, (1) those for which the liability does not arise from negligence in performance of the contract of carriage, but from the obligation of the carrier as an insurer, in which cases notice of or filing of the claims can be required; and (2) those for which the liability arises from such negligence, in which cases notice of a filing of the claims cannot be required, as a condition precedent to recovery.

And to us this seems to be a reasonable classification, since it dispenses with the requirement of any notice of claim to the carrier within the periods mentioned after the cause of action arose only in cases in which the carrier is liable because of its own or its connecting carrier's negligent conduct; which is a matter of fact peculiarly within the knowledge of the defendant carrier, or within its power [fol. 39] to obtain and preserve evidence of, by merely keeping, or having kept, for the period within which suit may be brought, the record of the condition of the property, the occurrences affecting it and what disposition is made of it, in all the several stages of its transit, from its receipt by the initial carrier until the contract of carriage terminates; and allow the notice to the carrier to be required, within certain periods as specified in the statute, (the length of which being dependent upon the character of the notice, being by notice of claim or by filing of claim) as a condition precedent to recovery in all cases in which the carrier is liable as an insurer, for loss, damage or injury due to some obscure and unknown cause, not within the knowledge of the defendant carrier or within its power to obtain and preserve evidence of, by keeping or having kept such a record as aforesaid,—in which character of cases it is but just that the carrier should have notice of claim within a reasonable time after the alleged cause of action arose, so that it may make special enquiry touching the facts which its records and the records of the connecting carrier could not be reasonably expected to show, before the evidence thereof has become lost.

Moreover, such construction of the statute makes its meaning intelligible and plain; whereas when any other meaning is attempted to be given to it, the statute becomes inconsistent, confused and unintelligible.

[fol. 40] Further: There are a number of decisions which hold that such is the true construction of the statute in question—some of them by Federal courts, others by State courts, all involving the construction of the statute, and some of them involving substantially the same material facts that are involved in the instant case. See Morrell v. Northern Pac. Ry. (N. D.), 179 N. W. 922; Bell v. N. Y. Central R. Co., 175 N. Y. Supp. 712; Hailey v. Oregon etc. R. Co. (District court, D. Idaho S. D.), 253 Fed. 569; Gillette etc. Co. v. Davis, (Director General), (Circuit Ct. of Appeals 1st Dist.), 278 Fed. 864; and Winstead v. East etc. Ry. (N. C.), 118 S. E. 887.

In Morrell v. Northern Pacific Ry. Supra, the cause of action arose under the aforesaid Federal statute after the enactment of the second Cummins Amendment. There was a shipment of certain cattle which were never delivered. Different cattle from those shipped were delivered to the consignee at destination—the exchange of cattle having occurred while the cattle were in transit, before they reached

the destination, and being due to the negligence of the carrier. There was a claim in the bill of lading requiring notice of claim within 90 days from the time the cause of action arose as a condition precedent to recovery. The court held that under the aforesaid proviso the clause in the bill of lading did not apply to the case, although it was [fol. 41] one of total loss of the property shipped, and not one of damage to the property, it being a case of non-delivery due to negligence of the carrier, which was embraced within the provisions of said proviso.

In the course of the opinion, in the case just cited, the court said this: "* * * From the facts established beyond dispute it appears that the stock covered by the contract was never delivered at destination and that the recovery is based on its non-delivery. The purpose of such a provision" (the clause in the bill of lading) "is doubtless to enable the carrier to investigate claims while the evidence is fresh, and thus affords a means of protection against fraudulent and exaggerated claims. That it was not intended to shield carriers from liability occasioned by their negligence may well be inferred from the provisions of section 8604a Comp. Stat. U. S. 1918, * * *" (quoting the aforesaid proviso). "In the instant case it appears * * * that the loss of the cattle was due to negligence, and it would therefore seem to be a case controlled by the proviso above quoted, wherein the carrier is prohibited from requiring notice as a condition precedent to recovery."

In Bell v. N. Y. Central R. Co., Supra (175 N. Y. Supp. 712), there was a shipment of pears. "The pears were unreasonably de- [fol. 42] layed in transit, the car was not properly placed for delivery, and several of the barrels and baskets containing the pears were broken open and the contents crushed and bruised." There was a clause in the bill of lading requiring making of claim substantially the same as in the bill of lading in the case in judgment. The cause of action arose under the aforesaid Federal statute after the adoption of the second Cummins Amendment. In the opinion of the court, after noting the aforesaid proviso, this is said: "It will be noted that both the Cummins Amendment and the bill of lading provision make a double classification of claims, to-wit: (1) Those for loss due to delay, or damage while being loaded or unloaded, or damaged in transit, which we will call transit claims; and (2) those for loss otherwise sustained, which we will call non-transit claims. The Cummins Amendment permitted the carrier to require as a condition precedent to recovery the filing of a non-transit claim within four months * * *. In the case of transit claims it forbade the carrier to require the filing of claim as a condition precedent to recovery * * *."

We cannot approve of the classification adopted by the court in the case just mentioned, which divides all cases of liability under the aforesaid Federal statute into two classes, transit and non-transit cases, for the reason that as aforesaid we think that all cases of liability under such statute are transit cases—there being no liability [fol. 43] under the statute before the contract of carriage is entered into or after it is completely performed, as the statute imposes lia-

bility only for the breach of the contract of carriage. The case, however, is in point in the holding that the aforesaid proviso forbids any notice or filing of claim being required as a precedent to recovery in any "transit case", as classified in the opinion, which classification covers such a case as the instant case, namely when there is a total loss of the property in transit.

In Hailey v. Oregon etc. R. Co., supra, 253 Fed. 569, the case arose under the Federal statute aforesaid and the action was instituted to recover damages occasioned the plaintiff by the non-delivery at destination of one of the horses shipped, by the death of two of the horses, for expenses of feed en route and for expenses of caring for and feeding of the remaining horses at destination in bringing them up to a fair condition for market, all caused by the negligence of the carrier while the shipment was in transit, but not while actually moving. There was a provision in the bill of lading as to making of claim substantially in the language of the aforesaid statute, including the proviso aforesaid. The court quotes and discusses the terms of the proviso and with respect to the proper construction of the proviso the opinion says this: "Upon consideration I am inclined to the view that the basis of classification intended by Congress must be found in the phrase "by carlessness or negli- [fol. 44] gence." It is used in no other place in the entire section, and in the absence of some other ground for classification it appears to be not improbable that the legislative mind made a distinction between liabilities resulting from the carrier's negligence and those which rest upon a different basis, and accordingly declared that the carrier should not require notice of claims of damages arising out of its own negligence. While, for reasons which it is unnecessary to explain, we may be unable to assent to the wisdom or justice of denying to the carrier this right, such seems to be the intent of the proviso. * * * The damages claimed were not the result of delay or injury in loading or unloading the horses; they were damages "in transit" as that phrase is ordinarily understood, and by the carelessness and negligence of the carrier, if the averments of the complaint are true. The phrase "carelessness and negligence" undoubtedly qualifies "damaged in transit".

"In the case of a claim for damages suffered in the loading or unloading of a shipment, the grammatical relation of the phrase, especially when we consider the punctuation, is more difficult. But in some particulars the grammatical construction is manifestly defective, and, that being true, it may very well be that the use of a comma is the result of inadvertence rather than of design. If in [fol. 45] other respects the structures were artistic, perhaps a different view should be taken; but under the circumstances it is thought we are warranted in entirely ignoring the comma after 'unloaded' or inserting it after 'transit'. In this view the proviso in effect relieves the shipper from giving notice or filing claim for such damages, and such damages only, as result from the carrier's negligence, either in loading the shipment at the point of origin, or in carrying it to the point of destination, or in there unloading it. A claimant must either allege and prove notice and the filing of a claim, or must allege and prove negligence."

In Gillette etc. Co., v. Davis, (Director General), Supra, (278 Fed. 864), the case arose under the aforesaid Federal Statute and the action was for damages occasioned the plaintiff shipper by the non-delivery and total loss of the shipment, after it had reached the point of destination, due to the theft of the goods, which theft, it was alleged, was due to the negligence of the defendant, transacting the business of an express company. There was a clause in the bill of lading with respect to making claim which was substantially the same as in the instant case. The court quoted and construed the [fol. 46] meaning of the aforesaid proviso contained in the statute when read along with the provision in the preceding portion of the statute requiring the issue of a receipt or bill of lading for the property shipped and making the carrier "liable to the lawful holder thereof for any loss, damage or injury to such property carried by it or by any connecting carrier * * *" etc., and held that the case was embraced within the proviso, if the non-delivery and consequent total loss was due to the negligence of the defendant, and in the opinion this is said: "* * * it is clear that Congress intended by the language of the Act that the carrier should be responsible for loss *occasioned the consignee* by the carrier's negligent delay, negligence in loading or unloading, *and negligence in transit.*" * * * (Italics supplied.)

At common law a carrier was liable for "any loss or damage which resulted from human agency, or any cause not the act of God or the public enemy. Adams Express Co., v. Croninger, 226 U. S. 491, 509, 33 Sup. Ct. 148, 153, 57 L. ed. 314, 44 L. R. A. (N. S.) 257."

"Under section 7 of the bill of lading, as authorized by the Act of March 4, 1915," (containing the first Cummins Amendment which contains the aforesaid proviso), "the carrier is liable for any loss or damage resulting from any human agency, or some cause not the act [fol. 47] of God or the public enemy, in case the consignee has given notice in writing of a claim of loss within four months after delivery of the property, or, in case of failure to make delivery, has given such notice within four months after a reasonable time for delivery has elapsed. *And if the consignee has failed to give the requisite notice,* the carrier *is liable for* negligent delay, if any, in delivering the property, or *negligence* while loading or unloading it or *in transit,* resulting *in the consignee's loss.*" (Italics supplied.)

In Winstead v. East etc. Ry. Supra (118 S. E. 887), the cause of action also arose under the aforesaid Federal statute involved in the instant case. The action was for damages occasioned the plaintiff by the non-delivery and consequent total loss of a part of the shipment and by the delay in the transportation of the residue of the shipment of cotton, all due, as alleged, to the negligence of the carrier. There was in the bill of lading precisely the same clause with respect to making claim as in the bill of lading in the instant case. The court held that the alleged negligence was established by the evidence, and that the aforesaid proviso, when read in the light of the preceding provision of the statute, which require the carrier to issue the receipt or bill of lading for the property shipped, makes the car- [fol. 48] rier "liable to the lawful holder thereof for any loss, damage

or injury to such property carried by it or by any connecting carrier," etc., and that the proviso embraced the claim of dam[illegible]s to the plaintiff due to the total loss of a part of the shipment, as well as such damages due to the delay in the transportation of the residue of the shipment, and that the defendant carrier was, by the statute, "deprived of any defense arising from the failure of plaintiff to give notice of claim," both as to the former and the latter claims of the plaintiff. Citing Gillette etc. Co., v. Davis, and Hailey v. Oregon etc. R. Co., Supra, with approval.

The following other cases are cited in argument for the defendant to sustain the position "that a total loss in transit is not a damage in transit, within the meaning of the (aforesaid) statute," namely Missouri Pacific v. Reed. (Ark.), 228 S. W. 1047; Freeman v. A. C. L. (S. C.) 113, S. E. 69.

Missouri Pacific v. Reed involved an intra-state shipment only.

In Freeman v. A. C. L. it does not appear that the loss was due to the negligence of the carrier, and the opinion merely refers to Mills v. N. W. R. R. Co., 115 S. C. 224, 105 S. E. 343 as showing there could be no recovery in the absence of claim or notice of claim within the six months from delivery of the shipment required by the [fol. 49] bill of lading. No reference is made in the opinion to the Federal statute aforesaid, and, while the shipment was made after that statute was in force, it seems plain that the Federal statute was not called to the attention of the court and was not applied in that case. Reference to Mills v. N. W. R. R. Co., discloses that it involved an intra-state shipment only, making it manifest that the court in its holding did not have the Federal statute in mind.

It is further contended in argument for the defendant that the loss, damage or injury complained of in the instant case did not occur while the property was "in transit"; that after the property reached the point of destination it was no longer "in transit", although the contract of carriage had not been completely performed, by delivery according to the contract, or by the expiration of the free time for delivery; and Bell v. N. Y. Central R. Co., Supra (175 N. Y. Supp. 712); Royal Ins. Co., v. Texas, 115 S. W. 117; Amory M'fg. Co., v. Gulf etc. R. Co., 37 S. W., 857; and Gulf etc. [fol. 50] R. Co. v. Peperell M'f'g. Co., Idem 965; are cited in support of such contention.

Bell v. N. Y. Central R. Co., does not sustain the contention which it is cited to support. Although it does not appear from the report of the case whether the loss complained of in that case, which was occasioned by damage to a portion of the pears shipped, occurred before or after the pears reached the point of destination and were wrongly placed for delivery, the court held that it was a case of loss due to "damaged in transit", which it called a "transit" claim.'

The precise point involved in the Bell case was a mere matter of pleading—whether the court below was right in refusing to strike out the defense that the action was barred because not brought within two years. The appellate court held that the court below was right in its decision for the reason that, although it was a transit case, in which no requirement of making claim within four months

as a condition precedent to recovery was or could have been validly required by the bill of lading, yet the bill of lading contained the requirement, which was valid under the aforesaid Federal statute, that the action must be brought within two years. The court does not, it is true, in the opinion advert to the distinction above men- [fol. 51] tioned, namely, that the proviso aforesaid embraces only transit cases in which the loss, damage or injury complained of is due to negligence of the initial or connecting carrier. This omission, however, is doubtless explained by the fact that the court was dealing with a mere question of pleading, there being no objection to the pleading because of its lack of allegation of negligence so far as appears, and likely the pleadings as a whole or the record otherwise showed, although the report of the case does not disclose it that the case was one of negligence.

Royal Ins. Co., v. Texas did not involve any contract of carriage whatever, either interstate or intra-state; but merely the construction of the terms of a fire insurance policy issued to the railroad company materially different from the terms of the Federal statute which we have under consideration. The same is true of Amory M'f'g. Co. v. Gulf etc. R. Co., and Gulf etc. R. Co. v. Peperell M'f'g Co.

We think that "in transit", as used in the proviso aforesaid, means at any time after the property has been received by the initial carrier for interstate transportation and before the contract of carriage for the entire transportation is completely performed; and that the entire transportation includes delivery in accordance with the contract—which contract, of course, is assumed to be one [fol. 52] which is valid under the aforesaid Federal statute. Jennings etc. v. Virginian Ry., 30 Va. App. 1, 137 Va.—, S. E.—, and cases cited. See also Michigan etc. R. Co. v. Mark Owen & Co., 41 U. S. Sup. Ct. Rep. 554, 65 L. ed. 1032.

In the case last cited the loss or damage complained of was a total loss of a certain portion of the property shipped (grapes), occasioned by the negligence of the carrier after the grapes reached the point of destination and the car containing same in good condition had been placed on the proper delivery track; and the plaintiff had commenced unloading the property. The loss occurred after the acceptance of the car and its unloading had commenced, but before the 48 hours free time had expired after notice of its arrival had been sent in accordance with clause 5 of the bill of lading. Precisely the same clause is also contained in the bill of lading in the instant case. The Supreme Court held the defendant liable as carrier and in its opinion this is said: "* * * The property here was not delivered; access only was given to it that it might be removed, and 48 hours were given for the purpose. Pending that time it was within the custody of the railroad company, *the company having the same relation to it that the company acquired by its receipt and had during its transportation.*" (Italics supplied.)

The case will be affirmed.

Affirmed.

[fol. 53] IN SUPREME COURT OF APPEALS

[Title omitted]

ARGUMENT AND SUBMISSION—January 16, 1924

Upon a writ of error to a judgment rendered by the court of Law and Chancery of the city of Norfolk on the 10th day of August, 1921.

This case was this day fully heard upon a transcript of the record of the judgment aforesaid and arguments of counsel; but, because the court here is not yet advised of its judgment to be given in the premises, time is taken to consider thereof.

A copy. Teste. H. Stewart Jones, C. C.

[fol. 54] IN SUPREME COURT OF APPEALS

[Title omitted]

Upon a Writ of Error to a Judgment Rendered by the Court of Law and Chancery of the City of Norfolk on the 10th Day of August, 1921.

JUDGMENT—March 20, 1924

This day came again the parties by counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore considered that the same be affirmed, and that the plaintiff in error pay to the defendant in error damages according to law, and also its costs by it expended about its defence herein.

Which is ordered to be certified to the said court of Law and Chancery of the city of Norfolk.

A copy. Teste: H. Stewart Jones, C. C.

[fol. 55] IN SUPREME COURT OF APPEALS

CLERK'S CERTIFICATE

I, H. Stewart Jones, Clerk of the Supreme Court of Appeals of Virginia, do hereby certify that the foregoing is a true and accurate copy of the record in the case of James C. Davis, Director General, Etc. v. John L. Roper Lumber Company on file and of record in my said office.

Given under my hand and the seal of this court this 5th day of May, 1924.

H. Stewart Jones, C. C.

IN SUPREME COURT OF APPEALS

JUDGE'S CERTIFICATE TO CLERK

I, Frederick W. Sims, President of the Supreme Court of Appeals of the State of Virginia, hereby certify that H. Stewart Jones, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing the same, Clerk of said Court, and duly qualified.

Frederick W. Sims, President.

IN SUPREME COURT OF APPEALS

CLERK'S CERTIFICATE TO JUDGE

I, H. Stewart Jones, Clerk of the Supreme Court of Appeals of the State of Virginia, hereby certify that Frederick W. Sims, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing the same, President of said Court, duly commissioned and qualified.

Witness my hand and the seal of said Court this 5th day of May, 1924.

H. Stewart Jones, Clerk. (Seal of the Supreme Court of Appeals of Virginia.)

Endorsed on cover: File No. 30,381. Virginia Supreme Court of Appeals. Term No. 418. James C. Davis, Director General and Agent, etc., petitioner, vs. John L. Roper Lumber Company. Petition for writ of certiorari and exhibit thereto, with notice and proof of service. Filed May 31st, 1924. File No. 30,381.

[fol. 56] IN SUPREME COURT OF THE UNITED STATES

On Petition for Writ of Certiorari to the Supreme Court of Appeals of the State of Virginia

ORDER GRANTING PETITION FOR CERTIORARI—Filed June 9, 1924

On consideration of the petition for a writ of certiorari herein to the Supreme Court of Appeals of the State of Virginia and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

No. 1071 [redacted]379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923 1925

JAMES C. DAVIS, Director General and Agent (Norfolk Southern Railroad),

Petitioner,

v.

JOHN L. ROPER LUMBER COMPANY,

Respondent.

NOTICE, MOTION, PETITION AND BRIEF FOR WRIT OF CERTIORARI

R. M. HUGHES, JR., *Counsel.*

A. A. McLAUGHLIN, *Of Counsel.*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

JAMES C. DAVIS, Director General and Agent (Norfolk Southern Railroad),

v. *Petitioner,*

JOHN L. ROPER LUMBER COMPANY,

Respondent.

NOTICE

To John L. Roper Lumber Company or Claude M. Bain, its Attorney of Record:

This is to notify you that the petitioner will, on the 2nd day of June, 1924, or as soon thereafter as counsel may be heard, present to the Supreme Court of the United States, in its court room at Washington, D. C., his motion for a writ of certiorari upon his verified petition and a copy of the entire record in this cause; and a copy of said motion, said petition and brief accompanying same are herewith delivered to you this 17th day of May, 1924.

JAMES C. DAVIS,
Director General and Agent,

By

R. M. HUGHES, JR.,
Counsel.

ACCEPTANCE OF SERVICE

The foregoing notice, and delivery of copy thereof and of motion and petition for writ of certiorari and brief are hereby acknowledged this 17th day of May, 1924.

CLAUDE M. BAIN,
Attorney for Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

JAMES C. DAVIS, Director General and Agent (Norfolk Southern Railroad), *Petitioner,*

v.

JOHN L. ROPER LUMBER COMPANY,

Respondent.

MOTION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

Now comes James C. Davis, Director General and Agent, petitioner, by his counsel, and moves this Honorable Court that it will by certiorari, or other process, directed to the Honorable Judges of the Supreme Court of Appeals of Virginia, require said Court to certify to this Court for its review and determination a certain cause in said Supreme Court of Appeals of Virginia lately pending, wherein the petitioner, James C. Davis, Director General and Agent, was plaintiff in error and John L. Roper Lumber Company, a corporation, was defendant in error; and to

that end the petitioner now tenders herewith his petition and brief with a certified copy of the entire record in said cause in said Supreme Court of Appeals of Virginia.

A. A. McLAUGHLIN,
R. M. HUGHES, JR.,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

JAMES C. DAVIS, Director General and Agent (Norfolk Southern Railroad),

Petitioner,

v.

JOHN L. ROPER LUMBER COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of James C. Davis, Director General and Agent, petitioner, hereinafter called defendant, respectfully shows to this Honorable Court:

1. On March 25, 1921, John L. Roper Lumber Company, a corporation, hereinafter called plaintiff, filed a notice of motion for judgment in the Court of

Law and Chancery of the City of Norfolk, Virginia, against John Barton Payne, Director General of Railroads, as operator of the Norfolk Southern Railroad, and as agent provided for under Section 206 of the Transportation Act of 1920. Said petition is found at pages 10 and 11 of the printed transcript of the record filed herewith. The said John Barton Payne was the predecessor in office of the present petitioner, James C. Davis, Director General of Railroads and Agent. The plaintiff sought and obtained a judgment for $1046.88 for the wrongful delivery in the summer of 1918 at Clarksburg, West Virginia, the bill of lading destination, of a carload of scrap iron shipped from New Bern, North Carolina, over the Norfolk-Southern Railroad and its connecting carriers, by the plaintiff to its own order, notify George Yampolsky. The shipment was delivered to the notify consignee without surrender of the order notify bill of lading.

2. The case was tried by the Judge of the Court of Law and Chancery of the City of Norfolk without a jury on an agreed statement facts, which is found in the printed record at page 12 (and is repeated verbatim in the opinion of the Supreme Court of Appeals of Virginia at page 23).

3. The case turns wholly upon the federal question whether, under Section 20 of the Interstate Commerce Act as amended, plaintiff was entitled to recover without having filed with the carriers within six months notice of claim.

It appears from the facts as agreed that the defendant admits wrongful delivery at destination, and the plaintiff admits that no claim was filed within six

months. The only question before the court is the legal question whether the provisions of Section 20 of the Interstate Commerce Act in force at the time excused the plaintiff from filing claim within the time provided under the bill of lading.

The third paragraph of Section 3 of the bill of lading conditions was in the following language:

> "Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within six months after delivery of the property, or in case of failure to make a delivery, then within six months after a reasonable time for delivery has elapsed. Unless claims are so made, the carrier shall not be liable."

The closing sentence of Section 20 of the Interstate Commerce Act, as it read at the time that the alleged cause of action herein accrued, was as follows:

> "Provided, however, that if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery. (24 Stat. 386, 34 Stat. 595, 38 Stat. 1196, 39 Stat. 441." 8 U. S. Comp. Stat., p. 9291, Sec. 8604).

The plaintiff contends that no notice of claim was required because the case comes within the language "damaged in transit by carelessness or negligence," as

found in this statute. It, therefore, becomes necessary to interpret the meaning of this statute and apply same to the facts of this case. It is obvious that the plaintiff in this case does not complain of loss "due to delay or damage while being loaded or unloaded." We may, therefore, simplify our problem by eliminating that phrase of the Act from consideration. With this elimination, the Act excuses filing of claim "if the loss, damage or injury complained of was due to * * * damaged in transit by carelessness or negligence."

4. The Court of Law and Chancery of the City of Norfolk entered judgment for the plaintiff on the 19th day of July, 1921 (R. 172).

5. Writ of error was awarded by the Supreme Court of Appeals of Virginia on the 6th day of June, 1922 (R. 9).

Upon this writ of error a hearing was had in the Supreme Court of Appeals of Virginia at Richmond on Wednesday, January 16, 1924 (R. 42). On the 20th day of March, 1924, the said court affirmed the judgment of the Court of Law and Chancery of the City of Norfolk by order appearing in the record at page 43; and the opinion in said Court appears in the record at pages 22 to 42, inclusive. (Reported in 122 S. E. 113.)

6. In the appellate proceedings in the Supreme Court of Appeals of Virginia the defendant assigned the following errors of the Court of Law and Chancery of the City of Norfolk (R. 2):

1. The court erred in overruling the defendant's motion for a new trial and in arrest of judgment, and in entering judgment against the defendant.

2. The court erred in holding that the plaintiff was entitled to recover against the defendant on the claim in suit without having given notice of said claim in writing to the carrier at the point of delivery or at the point of origin within six months after delivery of the property, or within six months after a reasonable time for delivery, in accordance with the terms of the bill of lading.

3. The court erred in holding that the circumstances of the case brought the plaintiff within the terms of the Cummins Amendment to Section 20 of the Interstate Commerce Act excusing, under certain conditions, notice and filing of claim as a condition precedent to recovery.

The Supreme Court of Appeals of Virginia, in affirming the judgment of the Court of Law and Chancery of the City of Norfolk, committed the same errors as those assigned against the trial court; and this writ is sought to correct the said errors of the Supreme Court of Appeals of Virginia, as will appear from the record accompanying this petition, including the opinion of said court.

7. The judgment of the Supreme Court of Appeals of Virginia is a judgment of the highest court of the State of Virginia in which a judgment could be had in this cause, and the suit involves the federal question

of the rights of the defendant under the 20th Section of the Interstate Commerce Act of Congress of the United States as amended, and accordingly said judgment is reviewable by this court by certiorari or other process.

8. The question involved is one of great public importance since the effect of the decision is to nullify, in certain cases, the provisions of the uniform bill of lading adopted by all carriers following the passage of the Second Cummins Amendment.

The question involved is also one which calls for a decision of the Supreme Court in order to settle and harmonize conflicting decisions by different appellate courts, federal and state.

WHEREFORE, upon due consideration of this petition and the annexed brief, and the certified copy of the record of the Supreme Court of Appeals of Virginia filed herewith, the defendant and petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the Supreme Court of Appeals of Virginia, commanding that Court to certify and send to this Court on a date to be designated a full and complete transcript of the record of all proceedings had in this cause to the end that the same may be reviewed and determined by this Honorable Court under said writ as is provided by law. And petitioner prays that upon the final consideration of this cause, and of said writ, the said judgment of the Supreme Court of Appeals of Virginia be reversed by this Honorable Court and judgment rendered in favor of the defendant.

Petitioner further prays for such other equitable and general relief as may appertain to this case and as may be competent for this Honorable Court to grant.

R. M. HUGHES, JR.,
Counsel for Petitioner.

A. A. McLAUGHLIN,
Of Counsel.

STATE OF VIRGINIA,
CITY OF NORFOLK, } TO-WIT:

Before me, the undersigned notary public, personally appeared R. M. Hughes, Jr., who being duly sworn, deposes and says: That he is a member of the bar of the Supreme Court of the United States, and is of counsel for petitioner herein; that he has read the foregoing application for a writ of certiorari; and that all the facts therein stated are true and correct to the best of his knowledge and belief.

R. M. HUGHES, JR.

Subscribed and sworn to before me this 17th day of May. 1924.

JULIA K. GOFF,
Notary Public.

INDEX-ANALYSIS OF BRIEF.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

JAMES C. DAVIS, Director General and Agent (Norfolk Southern Railroad),

Petitioner,

v.

JOHN L. ROPER LUMBER COMPANY,

Respondent.

BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI

We have set out in our petition the issue involved in this case.

At best, the language of the Cummins Amendment to Section 20 of the Interstate Commerce Act there quoted is incoherent and almost unintelligible. The English of the sentence defies analysis.

"But" (as said by the court in the Missouri case of *Loesch* v. *Union, &c., Co.*, 75 S. W. 621, 625) "courts are often required to discover meaning of contracts awkwardly expressed." And the same is equally true as to the meaning of statutes.

1. The plaintiff was not excused from filing claim because the damage complained of was not sustained while the shipment was "in transit."

In order for a plaintiff to bring himself within the exception excusing the filing of claim as provided in the statute under consideration, it is necessary not only that there should have been damage by carelessness or negligence, but that the alleged damage occur in transit.

The plaintiff is not excused from giving notice, because the property was not in transit when the defendant made wrongful delivery without requiring surrender of bill of lading. On the contrary, the property was at destination and transit was completed.

The precise question has been dealt with, and decided in favor of our present contention, by the First Department of Appellate Division of the Supreme Court of New York (May 2, 1919), and in the case of *Bell, et al* v. *New York Central R. Co.*, 175 N. Y. Sup. 712, from which case we quote as follows:

> "It will be noted that both the Cummins Amendment and the bill of lading provision make a double classification of the claims, to-wit: (1) Those for loss due to delay or damage while being loaded or unloaded, or damaged in transit, which we will call transit claims; and (2) those for loss otherwise sustained, which we will call non-transit claims. The Cummins Amendment permitted the carrier to require as a condition precedent to recovery the filing

of a non-transit claim within four months, and in such cases to require suit to be instituted within two years. In the case of transit claims it forbade the carrier to require the filing of claims as a condition precedent to recovery, but authorized a requirement that suit be instituted within two years.

In the bill of lading provision adopted under the authority of the amendment, we find first the requirement for the filing of a claim in non-transit cases within four months, which is a condition precedent to recovery. No provision whatever is made limiting the time within which suit may be instituted in the case of non-transit losses where claims are filed. The next sentence has for its purpose the fixing of a two-year limitation for the institution of suit in transit cases, and prescribes the period as two years. It reads:

'Suits for the recovery of claims for loss or damage, notice of which is not required, and which are not made in writing to the carrier within four months as above specified, shall be instituted only within two years,' etc.

It is obvious that the claim in suit is within the class which we have called for brevity the transit cases, in that therefore it is one for a loss of which notice is not required, and for which a claim does not have to be filed in writing.

* * * * * * *

> The meaning of the provision in the bill of lading therefore is this: In non-transit cases, notice of claim must be filed with the carrier within four months, as specified, which is a condition precedent to recovery. In such cases, where the notice of claim is filed, the short statute of limitations does not apply. In all other cases, namely, transit loss cases, suit must be instituted within two years."

The New York case was the reverse of the case at bar because it was a transit case; and the case at bar comes within the category of non-transit cases wherein the New York court held filing of claim to be necessary. The only difference between the bills of lading in the two cases is that in the New York case the bill of lading was of a later vintage and had been revised to conform to the terms of the Cummins Amendment. In the case at bar such revision had not been made, but in contemplation of law the Cummins Amendment must be read into the bill of lading.

In the Texas case of *Royal Insurance Company* v. *Texas, &c., R. Co.* 115 S. W. 117, a fire policy on cotton exempted the insurer from liability for fire occurring on open cars in transit. The court held that cotton on a car stationary at the point of origin was not covered by the policy, and at page 121 defined "in transit" as meaning "literally in course of passing from point to point."

Two other Texas cases deal even more explicitly with this question, and are cited and quoted below.

Amory Mfg. Co. v. *Gulf, &c., R. Co., 37 S. W. 856, 857.*

"Was the cotton, while on the compress platform, 'in transit' within the meaning of the bill of lading? It is contended upon the one side that the words 'in transit' are the equivalent of the words '*in transitu*,' and that the goods in the hands of a carrier are in transit from the moment of delivery to the carrier until they reach the hands of the consignee. In a sense, the meaning of the two phrases is the same. The one is a literal translation of the other. But, as actually employed, they have a materially different meaning and application. 'In transit' means literally in course of passing from point to point, and such is its common acceptation. Such, also, is the literal meaning of the phrase '*in transitu*,' but, for the sake of convenience in defining the right of a creditor to stop goods which have been sold but not delivered to an insolvent purchaser, they have been given a broader technical signification. It may be doubted whether the phrase is ever used in our language in any other connection. It would seem, therefore, that, if the parties to the contract in question had desired to employ a single phrase which would cover the carrier's exemption from liability from the time the goods were received by it until it had delivered them to the consignee, they would have used the more comprehensive terms. Had they done so, a more difficult question would have been presented. But here the words 'in transit' the words actually used, according to their ordinary signifi-

cation, apply only to the cotton from the time the transportation was to begin until the time it was to end under the contract. The cotton, not having been set in motion towards its destination, was not in fact in transit; and we cannot hold it constructively in transit while on the platform, without unwarrantably extending the meaning of a well defined word, and doing violence to a well established canon of construction."

Gulf, &c., R. Co. v. *Pepperell Mfg. Co.* 37 S. W. 965.

"In an action against a railroad company for loss of cotton belonging to plaintiff it appeared that the cotton was placed on the platform of a compress company to be compressed; that, while it was in possession of such company, and on its platform, defendant executed bills of lading binding itself to transport it; and that it was afterwards burned while on such platform. Held, that such cotton was not 'in depot or place of transshipment,' nor, 'in transit,' within a provision in such bill of lading that neither such company nor any connecting carrier while 'in transit' or while 'in depot or place of transshipment,' etc., should be liable for loss."

The First Department of the Appellate Division of the Supreme Court of New York has handed down another decision in support of our contention that

notice is excused only in transit cases. The case of *Van Pelt* v. *Barrett*, 199 N. Y. S. 509, holds that the provision of an express receipt requiring four months' notice of claim is not valid in "transit" cases because it collides with the Cummins Amendment. This case is additional authority for our contention that notice is not, and cannot be, excused in non-transit or delivery cases, such as ours. To the same effect see *Lisberger* v. *Bush Terminal*, 197 N. Y. S. 281, 283.

It is pertinent at this point to discuss the two decisions chiefly relied upon by the Lumber Company and the Virginia Court to excuse notice in this case.

The first of these is *Hailey* v. *Oregon Short Line*, 253 Fed. 569. A study and analysis of this case will show that it in no wise contravenes our position in the case at bar. On the contrary, the Federal District Judge of Idaho accepts as a pivotal consideration the fact that the shipment in that case was in transit when the horses were injured, and holds that the shipment was in transit while not in motion at an intermediate point of transit between the origin and destination. This in no way conflicts with our contention that transit begins when the shipment starts on its journey and ends when it arrives at destination. We did not, and do not, contend for the meticulous and preposterous refinement that transit stopped wherever and whenever the train stopped. We can easily agree with the Idaho Judge in his ruling that transit does not mean "while actually moving." Thus it will appear that the Hailey case was a transit case, in which notice was not required under the construction and interpretation of the Cummins Act for which we contend. It is true

that the Hailey opinion closes with a dictum suggesting the classification, with respect to requiring notice, of all cases as negligence or non-negligence cases. But this suggestion was not necessary to the decision and was not the turning point of the case. The same suggestion has been made by our adversary and the Virginia Court (R. 33), and we shall deal with that point under a subsequent heading herein. It may be noted in passing that the Idaho Judge, in support of this suggestion, undertakes to transplant the comma which follows the word "unloaded" in Section 20 of the Interstate Commerce Act and "grow" it after the word "transit."

The other case upon which the Lumber Company places its chief reliance is *Gillette Safety Razor Company* v. *Davis*, 278 Fed. 864. Here again we have a case of loss and damage in transit. It is true that the loss occurred after goods reached defendant's receiving platform at destination and before they were loaded on trucks for delivery to consignee. But, in placing so much reliance and emphasis on this case, our opponent overlooked the fact that "the transactions out of which the suit arises took place between the plaintiff and the American Railway Express Company at a time when the latter was under federal control." An express company differs from a railroad in that it is the duty of the former to deliver shipments to consignee *at their residences or places of business.* So that with express companies the transit status continues until such delivery, while in the case of railroads it ceases upon arrival of shipment at its station at point of destination. Therefore, the Gillette case was also a transit case,

and the facts are such as to support, rather than contravene, our position, although it also contains dicta with reference to the purely negligence classification similar to those in the Hailey case. Of this more anon.

The North Carolina case of *Mann* v. *Fairfield*, 96 S. E. 731, was a transit case.

2. The case at bar comes within the category of a non-delivery case, as to which the filing of claim is required, rather than in that of a transit case, as to which the filing of claim is excused.

By reading the pertinent portion of the Cummins Amendment into the bill of lading provision under consideration, it appears that the statute contemplates transit cases and non-delivery cases. Thus interpreted, wrongful delivery without surrender of bill of lading is not a loss, damage or injury due to delay or damage in transit. On the contrary, the wrongful delivery comes within the bill of lading category of "failure to make delivery."

A similar provision was contained in the bill of lading involved in the case of *Blish Milling Co.* v. *Railway*, 241 U. S. 190, 195. At the time the Blish Milling Company shipment was made, the first Cummins Amendment had not been enacted, nor was there any statutory provision in reference to requirements for giving notice of claim or for filing claims. The facts in the Blish case were substantially identical with the facts here involved. There was a delivery without surrender of the bill of lading. Claimants sought to

avoid the effect of the bill of lading provision by ignoring the contract and suing for a conversion. The court, however, held that notwithstanding the form of the suit, the bill of lading provisions governed and were lawful and enforceable. It was contended that the provision with reference to failure to make delivery was inapplicable where delivery was made to the wrong party. The court in denying such contention said:

> "But 'delivery' must mean delivery as required by the contract, and the terms of the stipulation are comprehensive—fully adequate in their literal and natural meaning to cover *all cases* where the delivery has not been made as required When the goods have been misdelivered there is as clearly a 'failure to make delivery' as when the goods have been lost or destroyed; and it is quite as competent in the one case as in the other for the parties to agree upon reasonable notice of the claim as a condition of liability. It may be urged that the carrier is bound to know whether it has delivered to the right person or according to instruction. This argument, however, even with respect to the particular carrier which makes a misdelivery, loses sight of the practical object in view. In fact, the transactions of a railroad company are multitudinous and are carried on through numerous employees of various grades. Ordinarily the managing officers, and those responsible for the settlement and contest of claims, would be without actual knowledge of the facts

> of a particular transaction. The purpose of the stipulation is not to escape liability but to *facilitate prompt investigation.* And, to this end, it is a precaution of obvious wisdom, and in no respect repugnant to public policy, that the carrier by its contracts should require reasonable notice of all claims against it even with respect to its own operations."

The first Cummins Amendment recognizes and puts in statutory form this doctrine, limiting it, however, to cases where the loss, damage, or injury is *not due* to delay or damage while loading or unloading, or in transit, due to carelessness or negligence of the railway company.

In the effort to extend and enlarge the meaning of the expression "in transit," the Virginia Court (R. 35, 36 and 41) undertakes to give it an interpretation synonymous with the term "transportation," and co-extensive with the whole field of carrier liability.

The expression "in transit" is not co-extensive with the expression "transportation." The very definition of transportation given by the Interstate Commerce Act shows that "in transit" is a sub-classification or sub-division of "transportation," because the words "in transit" are used in that very sense in the following quotation from the very first section:

> "The term '*transportation*' as used in this Act shall include locomotives, cars and other vehicles, vessels and all instrumentalities and facilities of shipment or carriage irrespective of

> ownership or any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation and transfer *in transit*, ventilation, refrigeration or icing, storage and handling of property transported."

The authorities cited relate merely to the scope of carrier liability in its entire field. We do not question the proposition which they lay down, but we do deny that the expression "in transit" comprehends the whole field of carrier liability, even if it is true that "transportation" does.

The North Dakota case of *Morrell* v. *Northern Pacific*, 179 N. W. 922, is of no assistance in the solution of our problem here because the provision under construction required notice only after delivery at destination, and the court held that such notice was unnecessary in that case because the shipment was never delivered at destination. But the third paragraph of Section 3 of the bill of lading, under construction in the case at bar, provides for such claim "in case of failure to make a delivery then within six months after a reasonable time for delivery has elapsed." And it is conceded that no claim was ever filed.

Winstead v. *East Carolina Ry.*, 118 S. E. 887, is an apparent ruling in favor of plaintiff on the point at issue. But the case contributes nothing to the problem because it does not even undertake to unravel the difficulty by any helpful discussion or reasoning. And, in holding that notice of claim is excused in case of total loss of property and in case of delay, the decision runs counter to numerous decisions which we shall herein-

after cite to the effect that the circumstances of total loss and delay damage are not within the exceptions excusing notice of claim.

The Honorable President of the Virginia Court, in interpreting the word "transit" to be co-extensive with the word "transportation," cites the previous recent Virginia decision of *Jennings* v. *Virginian Railway*, 30 Va. App. 1; 119 S. E. 14, wherein he was the author of the opinion. In that case by way of dictum, the Court indulged in the unnecessary inference that "transit" was co-extensive with "transportation," saying in the right hand column of page 151 of the opinion in 119 S. E.:

> "at any time while the goods are in transit —that is, at any time before the contract of carriage is completed."

Doubtless President Sims felt impelled to adhere in the case at bar to that inference.

3. It is obvious from the context of the act that filing of claim is excused only in case of damage to the shipment while in transit.

If the plaintiff should prevail in the contention that wrongful delivery at destination is covered by the language of the statutory provision under consideration, all of the provisions of the statute as to filing of claim would be nullified. The non-requirement of notice would apply to every conceivable case. That such is not the intent of the statute is plainly shown by reason of the fact that the very clause now under

consideration is in itself clearly an exception. The existence of an exception presupposes a general rule outside of the exception. The plaintiff's contention would render the exception so broad as to leave nothing outside of it.

This argument is strengthened, indeed becomes unanswerable, in the light of the provision of the statute immediately preceding the concluding provision we have been considering, which provision is as follows:

> "Provided, further, that it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years."

It is obvious from the language of this provision that Congress has not intended to abolish completely the requirement of filing claim. And in the case at bar the plaintiff's failure to file claim within six months is in entire accordance with the requirements of these provisions of the statute which have been quoted and considered in this argument.

The plaintiff, having failed to file claim within six months, as required under the bill of lading, cannot recover.

The Virginia Court's answer to our suggestion that plaintiff's interpretation would so take the heart out of the provision under discussion as to nullify its effect is that a reasonable interpretation may be found in

excusing notice of claim only in negligence cases. While there have been some ill considered dicta to that effect among the decisions, it is plain from an examination of all the authorities that such an interpretation runs counter to numerous cases. The following cases hold that a total loss in transit is not a damage in transit within the meaning of the statute, and most, if not all, of them were negligence cases:

Missouri Pacific v. *Reed* (*Ark.*), 228 S. W. 1047;
Henningson Produce Co. v. *American Ry. Express* (Minn.), 118 N. W. 272;
St. Sing v. *Express Co.* (*N. C.*), 111 S. E. 730;
Conover v. *Railway*, 212 Ill. App. 29;
Freeman v. *A. C. L.* (*S. C.*), 113 S. El 69.

The following cases hold that delay is not a damage in transit within the meaning of the statute, and all of them were negligence cases:

Lisberger v. *Bush Terminal*, 197 N. Y. S. 281;
Van Pelt v. *Barrett*, 199 N. Y. S. 509;
Hylton v. *Hines* (*Kans.*), 206 Pac. 871.

Counsel for the Lumber Company conceded that a proper interpretation of the proviso dispenses with the filing of claim only with the following prerequisites concurring:

1. Loss or damage,
2. Occurring in transit,
3. From carelessness or negligence of carrier.

It probably appears from the record in the case at bar that the third of these requirements exists. It appears that the second did not exist, and that is sufficient to defeat the Lumber Company's case. It is very doubtful whether the first requirement is here present, and we shall discuss that feature under our next heading. But it is significant that in listing and enumerating these three prerequisites our opponent expressly abandoned his previous contention that notice of claim is required in all cases of negligence.

The object of the Cummins Amendment is to legalize contract limitations for claim and suit with the proviso, however, that the limitation as to claim is not permissible in cases of (1) "delay or damage while being loaded or unloaded" (irrespective of negligence) and (2) in cases where the goods are "damaged in transit by carelessness or negligence." Misdelivery is neither (1) delay or damage in loading or unloading or (2) damaged in transit. It violates any reasonable interpretation of the language of the proviso to construe the first class as governed by the words "by carelessness or negligence," which qualify only the second class, a shipment damaged in transit. It involves not only a violent but unnecessary disregard of punctuation and sentence structure to "spread" these qualifying words in the last class so as to make them cover the first class also. The *Lisberger* case (supra) illuminates this classification by the following language on page 283 of the opinion in 197 N. Y. Sup:

> "An examination of the language of the bill quoted above, shows clearly that the only

> cases in which notice is not required are: (1) Where the loss, damage or injury is due to delay, or damage while being *loaded or unloaded;* and (2) where the shipment is '*damaged* in transit by carelessness or negligence.'"

So far as it is enlightening to sound the legislative motives that underlie the notice proviso, it is easy to find classifications more plausible and reasonable than the negligence test for which the plaintiff contends. It is more likely that other reasons prompted Congress to provide for notice in certain cases and to excuse it in others. Carriers are obliged to handle a multitude of shipments through numerous agents, each performing but a small portion of the service. The carrier could not be expected to know of the existence of claims as a general proposition, and could not make investigation unless advised thereof with reasonable promptness. The purpose of notice is to permit the carrier to make investigation while occurrences are sufficiently recent to enable those engaged in transactions to remember and report the facts. Evidently it was thought less important to require notice in cases of delay, because the carrier has its records showing the movement, and they are ordinarily available for a considerable time. Presumably it was also thought that damage during loading and unloading would be known to the carrier because localized. Damage in transit due to negligence was treated in the same category. Something in the way of commission or omission would be involved which the carrier ought to have knowledge of. But a total loss in transit would ordinarily not be known to

the carrier. The destination agent would not know the shipment had been made, and would, therefore, not have reason to know of non-delivery. The receiving agent would, therefore, be ignorant that the shipment had not reached destination. In cases of loss prompt notice would be essential to enable the carrier to protect itself by investigation, locating the property if possible and making delivery, or ascertaining the cause of loss, such as theft or otherwise, and possibly recouping itself by means of the knowledge promptly obtained.

Every reason prompting Congress to require notice to the carrier in any case applies with double force to the case of the loss of a shipment.

In other words, the purpose of the statute was to authorize the carrier to protect itself against stale claims. The proviso limited its protection in cases where the carrier might be presumed for some reason not to need it. Perhaps it was thought that loading or unloading at one spot was easily ascertainable, and that, as a matter of policy, physical damage in transit attributable to carelessness ought not to be included. Congress evidently bore in mind the peculiarly difficult spots in the claim field of market damage in delay cases, of deterioration of perishables, and of concealed losses; and also the distinction between delay and physical damage in the common law. Without altering the common law burden, and with the main purpose of protecting the carrier against stale claims, Congress must be deemed to have made these exceptions to the reasonable rule of notice to cover only those cases where, for some reason, the carrier could be deemed less in need of the protection afforded by notice of claim.

Evidently the need was considered a vivid one in cases of non-negligent delay, of loss, and in the kindred category of misdelivery.

4. The word "damage" or "damaged" as used denotes damage to the shipment itself. The shipment was not damaged. Hence plaintiff does not come within the exception excusing notice.

Pages 28 to 32 of the opinion deal with this point. It is true that the word "damage" (generally in its plural form) often denotes financial loss to a person as distinguished from injury to the property. Indeed the word is used with that very meaning in the first part of the statutory provision which we are construing. But its use there with that meaning only serves to strengthen what is otherwise clear; namely, that its later use in the sentence under construction denotes damage or injury to the shipment itself.

In the case of *L. & N. Ry. Co.* v. *Bell*, 13 Ky. Law Rep. 393, the Court construed the meaning of the expression "recover damages for loss or injury to" live stock. It was held that the requirement of filing of claim under such language applied only to damage to the property. The plaintiff's loss in that case was attributable to delay, and the Court held that under such circumstances filing of claim was not a condition precedent to recovery. The case cited is the converse of the case at bar. In the case cited plaintiff was excused from filing claim because the word "damage" as used in the bill of lading stipulation requiring notice

was held to denote damage to the property, while the plaintiff's damage was occasioned by delay in delivery. In the case at bar plaintiff is not excused from filing claim, because the word "damage" in the provision of the statute excusing notice means damage to the shipment and the plaintiff's loss was occasioned by wrongful delivery.

In the case of *L. & N. R. Co.* v. *Smith*, 14 Ky. Law Rep. 814, it was held that a provision in a bill of lading requiring shipper, as a condition of recovery of damages for loss or injury to stock, to give notice within a certain time applied only to a claim for damage on account of physical injury to the stock in transit, and had no application to a claim for damage on account of delay in transit.

To the same effect is *Leonard* v. *C. & A. R. Co.*, 54 Mo. App. 366. In its decision the Court stated as follows with reference to a bill of lading provision requiring notice of claim for loss or damage:

> "But the defendant says that there was no offer of evidence to show that plaintiff had given notice of his damage within five days after arrival at Chicago, as the contract provides in the words heretofore set forth. In our opinion that clause of the contract relates to injury or damage to the cattle themselves, while in the possession of the defendant, and would, therefore, cover the shrinkage of the cattle. But such provision will not cover a damage which the shipper may suffer by a change in the market or the like. A change in the market has no

reference to an injury to the cattle and cannot be included within the terms of the provisions of the contract."

Against this position is cited the Virginia case of *Norfolk Truckers Exchange* v. *Norfolk-Southern*, 116 Va. 466. But this case only construes the meaning of the word "damage" as used in the opening sentences of the Carmack-Cummins Amendment imposing generally a vicarious liability upon initial carriers for loss, damage or injury; and holds that the word "damage" there used includes delay. Those words are covering words, so to speak, inclusive of all classifications afterwards made by the Act. When we come to the specific classes provided for in the exception, it is apparent that the word "damaged" is different from the word "damage" as used in the previous covering phrase. In fact, it is obvious that we are dealing in the exception with subclassifications. Not only that, but we have to construe, not the word "damage" but the word "damaged" the phrase "damaged in transit," and it would seem that this phrase definitely excludes the idea of delay.

The eight cases cited under point 3 preceding, holding that damage through total loss or delay is not within the meaning of the statute, are authority for our contention that "damaged" means damage to the goods shipped rather than loss, damage or injury to their owner.

5. In view of the public importance of the question at issue and the conflicting decisions thereon by various Appellate Courts, a writ of certiorari should issue, the decision of the Supreme Court of Appeals of Virginia should be reversed, and the Supreme Court of the United States should enter judgment for defendant.

The question involved is one of great public importance since the effect of the decision is to nullify, in certain cases, the provisions of the uniform bill of lading adopted by all carriers following the passage of the Second Cummins Amendment.

It is seen from the foregoing discussion that teh various appellate courts, federal and state, which have interpreted the proviso upon which this case must be determined have arrived at different conclusions and by divers lines of thought. We know of no better way to present and emphasize the importance of a ruling on this controverted question by this highest court of the land than by quoting the language of the Honorable President of the Supreme Court of Appeals of Virginia, who said in the opinion of that court in this case as written by him (R. 26) as follows:

> *"The decision of the question just stated is not free from difficulty. Its final decision will depend, of course, on the ruling of the Supreme Court upon it, but, as yet, there has been no decision of that high tribunal upon the precise question. There have been a few decisions of*

courts of lesser jurisdiction upon the question which, however, are not in harmony; and the ascertainment of the proper construction of the statute, upon the meaning of which the decision depends, is more than ordinarily difficult because of the phraseology and punctuation of the statute." (Italics ours).

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

No. 79

JAMES C. DAVIS, Director General and Agent (Norfolk-Southern Railroad),

Petitioner,

v.

JOHN L. ROPER LUMBER COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF

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October, 1925.

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PETITIONER'S REPLY BRIEF

1. The case of Barrett v. Van Pelt (April 13, 1925), 45 Sup. Ct. 437, relied upon by respondent, is not determinative of the case at bar.

Respondent's reliance, in its brief, is chiefly upon the recent United States Supreme Court decision in the case of *Barrett, President of Adams Express Co.*, v. *Van Pelt* (No. 160, October Term, 1924), argued January 6, 1925, decided April 13, 1925, and reported in 45 Sup. Ct. at page 437.

While this decision embodies dicta apparently contrary to petitioner's position in the case at bar, a care-

ful examination will show that it is not determinative of this case. In the *Van Pelt* case the court went further in its expressions than the language of the Cummins proviso required, when the opinion entered into a discussion of negligence outside of the matter of delay. It is true that in restating the language of the proviso to conform to the court's construction the word "damaged" was changed so as to read "damage", and the comma after the word "unloaded" was omitted. But this was merely incident to the discussion in support of the conclusion that negligence was necessary to make the delay a damage for which recovery might be had without filing claim within the bill of lading limit. That argument is not necessarily applicable to the case at bar. The *Van Pelt* case was a delay in transit case, and this case is a misdelivery case. The sole question involved is whether there can be a recovery for misdelivery without filing claim. The court did not so hold in the *Van Pelt* case.

Even in the light of the Cummins proviso as restated by the court, filing of claim is not excused as a condition of recovery for misdelivery. A *fortiori* is such filing of claim not excused under the language of the Cummins proviso as written, rather than as restated in aid of its interpretation in the *Van Pelt* case. That restatement was as follows:

> "Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded or damage in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

The language of the statute is as follows:

> "Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery." (24 Stat. 386, 34 Stat. 595, 38 Stat. 1196, 39 Stat. 441. 8 U. S. Comp. Stat. page 9291, section 8604.)

The question before the court in the *Van Pelt* case was that of delay. The court construed the Cummins proviso as requiring carelessness or negligence as a cause of the delay in order that the carrier might be liable without notice of claim. The court also held that the burden was on the shipper to prove that carelessness or negligence existed.

We submit that filing of claim was not excused in the case at bar because the loss was not due to delay or damage while the shipment was being loaded or unloaded, nor due to damage in transit by carelessness or negligence. The loss was due solely to misdelivery. If Congress had intended to excuse filing of claim in order to recover for misdelivery, the statute should and would have so declared. The court cannot write into the statute such an additional provision. In the *Van Pelt* case the court emphasizes the thought that the intention of Congress must govern, and that the letter of the statute must yield to the intent. It would be a forced construction to say that Congress intended to include misdelivery in a proviso dealing with delay or damage during loading or unloading or damage in

transit. If misdelivery is not included, then notice of claim must be given within the bill of lading limit as a condition of recovery. Misdelivery is not within the proviso, and therefore notice was necessary, independent of the question of negligence. If Congress had intended to include such loss among those for which notice could not be required, it would have used more apt and definite language as an evidence of such intent.

Moreover, the *Van Pelt* case was plainly a case of loss or damage in transit. It was an express company case, and we have pointed out in our opening brief that in the case of express companies transit extends to the point of delivery to consignee at his place of business, because an express company so delivers while a railway carrier does not.

In one respect the *Van Pelt* decision goes even further in our support than the position that we have taken in the previous stages of this litigation. In holding that negligence is a necessary element in a shipper's recovery, it requires very strong express proof of such negligence, and holds that same may not be inferred from facts which would ordinarily make a prima facie case. It held that proof that an express shipment made at Louisville on February 23rd, going through to Pittsburgh without transfer and delivered on March 4th at New York presented a situation as to which negligence might not be inferred, although the ordinary time of a passenger train between Louisville and New York was 25 or 26 hours.

In the light of that rule the mere misdelivery of the shipment in the case at bar, without surrender of the bill of lading, does not establish that carelessness or

negligence existed. There might be facts or circumstances connected with the delivery without surrender of the bill of lading which would relieve the carrier from any inference of negligence. To meet the burden of proof shipper must show something more than the fact of delivery without surrender of the bill. The facts agreed do not affirmatively show negligence, and, since the burden is on the shipper, and notice was not given, a recovery cannot be had.

2. The other authorities relied upon by respondent fail to support a recovery without seasonable filing of claim.

Most of the arguments and authorities have been so fully developed in the courts below that in our opening brief in this case we have anticipated and met most of respondent's contentions. Therefore, in this reply brief, it is sufficient to make reference to previous discussions, with some brief additions to what we have said in our opening brief.

At the top of page 5 of respondent's brief our citation of the *Blish Milling Company* case is summarily dismissed with the statement that it ante-dates the Cummins Amendment. By reference to page 21 of our opening brief it will be seen that we stated that very fact in citing that case; and it will further be seen that the case supports the point for which we cite it.

At the bottom of page 5 of respondent's brief the doctrine of stoppage *in transitu* is invoked as an answer to our contention that delivery is not a part of transit. We have already answered this contention by quoting at page 17 of our opening brief from the case of *Amory*

Mfg. Co. v. *Gulf &c. R. Co.*, 37 S. W. 856. The expression "*in transitu*", familiar in connection with the doctrine of stoppage *in transitu*, furnishes no useful parallel to aid us in the solution of the problem at issue here. It is pertinent to repeat here just three sentences from the opinion in the case just mentioned,—

> " '*In transitu*' means literally in course of passing from point to point, and such is its common acceptation. Such, also, is the literal meaning of the phrase '*in transitu*' but, for the sake of convenience in defining the right of a creditor to stop goods which have been sold but not delivered to an insolvent purchaser, they have been given a broader technical signification. It may be doubted whether the phrase is ever used in our language in any other connection."

We concede that the term "transportation" covers delivery as well as transit, so that the carrier liability extends even for 48 hours after notice of arrival, as is stated on page 6 of respondent's brief. It is true that during such period *transportation* had not been completed. But on the other hand *transit* had been. The notice proviso deals with "transit", not "transportation."

At the middle of the same page of respondent's brief there is a quotation from the Commerce Act defining "transportation." As we pointed out at page 23 of our opening brief, this very statutory definition itself classifies "transit" as a subdivision of "transportation," as will appear in the bold face portion of respondent's quotation from the Act.

It is true that in the *Shuart* case, cited by respondent at the bottom of page 6 of its brief, "*transportation* was still in progress" when the animals were injured at destination before delivery. But *transit* had been completed. At the bottom of page 7 of its brief respondent invokes the case of *Brown* v. *Western Union Tel. Co.* (S. C.) 67 S. E. 146, and asks, "What is the difference between the telegraph message in the hands of the telegraph boy and the shipment of freight in the hands of the railway agent at destination?" The question is easily answered. The duty of a telegraph company, like that of an express company (which we have heretofore discussed in connection with the *Gillette* case), is to deliver at the residence or office of addressee; so that here again we have no useful parallel. Moreover, most states have special acts governing the handling of telegraph messages, and this South Carolina case turned upon such a local act. That delivery and transmission or transit are placed in separate categories under the law of Virginia may readily be seen by a glance at the following sections of the Code of Virginia: 4042, which covers transmission, and 4043, which covers delivery.

In our opening brief at page 25 we have already commented on the Virginia case of *Jennings* v. *Virginian Railway*, 119 S. E. 147, cited by respondent on page 8 of its brief.

On page 33 of our opening brief we have discussed the point as to which respondent cites on page 9 of its brief the cases of *N. Y. P. & N. R. Co.* v. *Peninsula Produce Exchange*, 240 U. S. 34, and *Norfolk Truckers Exchange* v. *Norfolk Southern R. Co.*, 116 Va. 466.

At pages 19 and 20, respectively, of our opening brief we have discussed the *Haley* and *Gillette* cases, found on page 100 of respondent's brief; and the *Morrell* case, found on pages 12 and 13, is dealt with in our opening brief at page 24. At pages 21 and 24 of our opening brief we have treated the North Carolina cases of *Mann* v. *Fairfield* and *Winstead* v. *Railway Co.*, cited in respondent's brief at pages 13 and 14, respectively.

The case of *Scott* v. *American Railway Rxpress Company*, 189 N. C. 377, is cited for the first time in this litigation at page 14 of respondent's brief. Like the *Gillette* case and others relied on by respondent, the *Scott* case was an express company case. We have already shown that "transit" covers a larger field in the case of express companies than in the case of railway carriers.

3. The liability imposed by Section 10 of the Bills of Lading Act does not affect the requirement of claim as a condition precedent to recovery under Section 20 of the Interstate Commerce Act.

The contention made at page 14 et seq. of respondent's brief that the Pomerene Bills of Lading Act establishes liability in this case, independently of the provisions of the Interstate Commerce Act, was a new comer in the Supreme Court of Appeals of Virginia, the point not having been raised in the trial court. This contention is tantamount to saying that the Pomerene Act repeals the Cummins Amendment, but it is obvious from the entire context of both acts that

they are to be read and construed together, and that neither repeals the other. The Cummins Amendment provides for the issuance of bills of lading on interstate shipments, and the Pomerene Act deals primarily with the form of bills of lading and the methods of issuance and use of same. It is true that Section 10 of the Pomerene Act is declaratory of the common law rule imposing liability for misdelivery of order notify shipments. Said section declares a rule of liability, and the last clauses of Section 20 of the Interstate Commerce Act relate to recovery on such liability. In other words the Cummins Amendment is in the nature of a limitation, affecting the remedy rather than the right, and so is in harmony with the Pomerene Act. It expressly speaks of the requirement of notice and filing of claim "as a condition precedent to recovery."

The Bills of Lading Act merely creates a liability in cases coming within its terms. But, in order to recover under that Act, claim must be filed as required in the bill of lading and authorized in the Cummins Amendment. Therefore, the Bills of Lading Act does not affect the question of the necessity for filing claim.

4. The judgment of the Supreme Court of Appeals of Virginia should be reversed.

Respectfully submitted,

R. M. HUGHES, JR.,

Counsel for Petitioner.

A. A. McLAUGHLIN,

Of Counsel.

October, 1925.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 79.

JAMES C. DAVIS, DIRECTOR GENERAL AND AGENT (NORFOLK SOUTHERN RAILROAD),----------Petitioner.

v.

JOHN L. ROPER LUMBER COMPANY,---Respondent.

BRIEF OF RESPONDENT.

STATEMENT OF FACTS

There is no dispute as to the facts in this case. Upon trial in the lower Court the case was submitted upon an agreed statement of facts (Record pp. 12-13).

On June 24th, 1918, John L. Roper Lumber Company delivered to James C. Davis, Director General of Railroads (Norfolk Southern Railroad), at New Bern, North Carolina, a carload of scrap iron, for transportation to Clarksburg, West Virginia. The shipment was made on what is known as an order notify bill of lading. By the terms of the bill of lading the shipment was consigned to the order of John L. Roper Lumber Company,

notify George Yampolsky. Upon arrival of the shipment at destination it was delivered to Yampolsky without requiring the surrender of the bill of lading.

John L. Roper Lumber Company did not file claim for the loss of the shipment until more than six months after delivery of the property.

The sole defense of petitioner was that claim was not filed within the time prescribed by the bill of lading.

PROVISIONS OF BILL OF LADING AND LAST PROVISO OF SECTION 20, ACT TO REGULATE COMMERCE.

The 3rd paragraph of Sec. 3 of the Bill of Lading contained the following provision:

> "Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within six months after delivery of the property, or in case of failure to make a delivery then within six months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable."

Section 20 of the Interstate Commerce Act in force at the time this cause of action accrued contains the following provision:

> "Provided, however, that if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

The provisions of Section 20 of the Act to Regulate Commerce, above quoted, must be read into the 3rd paragraph of Section 3 of the Bill of Lading.

It is the contention of the respondent that, under the above quoted provision of Section 20 of the Interstate Commerce Act, it was not necessary to file a claim, for the shipment was delivered without surrender of the original Order Notify Bill of Lading, which was a delivery by the carelessness and negligence of the carrier, and, therefore, a loss or damage in transit by carelessness or negligence.

It, therefore, appears that this case narrows itself to the construction of the above provision of Section 20 of the Interstate Commerce Act and particularly the words "damaged in transit by carelessness or negligence."

CONSTRUCTION OF LAST PROVISO OF SECTION 20 ACT TO REGULATE COMMERCE.

This Honorable Court has very recently had occasion to construe this proviso of Section 20 of the Interstate Commerce Act. Barrett v. Van Pelt, decided April 13, 1925, No. 160, October Term, 1924.

In the above mentioned case it was held to be proper to eliminate the final "d" in "damaged" and to omit the comma after "unloaded". By so doing it would make the clause read as follows:

> "Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded or damage in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

So it was said:

> "We hold that the second clause must be read as above indicated, that carelessness or negligence is an element in each case of loss, damage or injury included therein, and that, in such cases, carriers are not permitted to require notice of claim or filing of claim as a condition precedent to recovery. See Hailey v. Oregon Short Line R. Co., 253 Fed. 569."

The agreed statement of facts admits that the shipment was delivered without surrender of the bill of lading. This was negligence on the part of the carrier, for the duty of the carrier was to see that the shipment was not delivered without surrender of the bill of lading properly endorsed. See Sections 9 and 10 of Bills of Lading Act, 39 Stat. L. 538.

and brief for certiorari, admits that the element of carelessness and negligence exists in this case. But the petitioner attempts to justify the refusal to pay the claim on the ground that the shipment was not in transit, and that there was no actual physical damage to the shipment.

In view of what was said in the above mentioned case of Barrett v. Van Pelt, we do not think that either of those claims are tenable.

We do not deem it necessary to discuss this question at length. We do contend, however, that the case of Barrett v. Van Pelt (supra) fully sustains the judgment of the trial court.

THE SHIPMENT WAS IN TRANSIT

Petitioner discusses at some length that the case at bar is a non-delivery case and not a transit case. Reference is made to the case of Blish Milling Co. v. Railway, 241 U. S. 190, 195. We have no contentions to make as to what was decided in that case. However, the shipment involved therein moved in 1910 and therefore the Cummins Amendment had no application. We feel that we might go so far as to refer to a part of the quotation from the Blish Milling Co. case, found on page 22 of petitioner's brief:

> "But 'delivery' must mean delivery as required by the contract, and the terms of the stipulation are comprehensive—fully adequate in their literal and natural meaning to cover all cases where the delivery has not been made as required. When the goods have been misdelivered there is as clearly a 'failure to make delivery' as when the goods have been lost or destroyed."

So, in the case at bar the misdelivery or failure to make delivery in accordance with the terms of the contract was a loss to the owner by the negligence of the carrier.

It is our opinion that the words "in transit" as used in the proviso mean while the goods are in the possession of the carrier as carrier.

Many cases could be cited upholding the doctrine that the right of stoppage in transit exists after arrival of the shipment at destination; where they are held in warehouse for default in payment of freight or so long as the shipment is not in the actual or constructive possession of the consignee.

It would indeed be a narrow construction or interpretation to hold that the goods are not "in transit" after arrival at destination. The carrier's liability as such, under the provisions of the Bill of Lading, does not change to that of warehouseman until forty-eight (48) hours after notice of arrival. The loss and damage herein complained of was due to the negligence of the carrier in delivering the shipment without surrender of the original order bill of lading. At that time the transportation had not been completed.

The words "in transit" as used by Congress come within the meaning of the word "transportation."

And by Section 1 of the Act to Regulate Commerce, Congress has defined the term "transportation," as follows:

> "The term 'transportation' as used in this Act shall include locomotives, cars and other vehicles, vessels and all instrumentalities and facilities of shipment or carriage irrespective of ownership or any contract, express or implied, for the use thereof and **all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported.**"

See also case of Cleveland, etc. Railroad v. Dettlebach, 239 U. S. 588, 60 L. Ed., 453; 36 Supreme Court Reporter, 177.

In the case of Erie R. R. Co. v. Shuart, 250 U. S., 465; 63 L. Ed. 1088, it was held that after the car had arrived at destination and the carrier had placed it on the switch track opposite a chute and left it in charge of the consignee for unloading, transportation of the shipment was still in progress. The Court in that case said:

> "The animals were in the car; no adequate time for unloading had transpired. The carrier had not fully performed the services incident to final delivery imposed by law. This included the furnishing of fair opportunity and proper facilities for safe unloading, although the shippers had contracted to do the work of actual removal."

The attention of the Court is further invited to the case of Michigan Central R. R. v. Mark Owen & Company, 41 Sup. Ct. Rep., 554; 65 L. Ed. 690. It was held in that case that the relation of a carrier to a shipment during the first 48 hours after a car has been placed on the public delivery track at destination and notice of arrival has been given to the consignee, is that of carrier or insurer. The Court holds that until the responsibility of warehouseman attached, that of carrier continued. The opinion of the Court in this case is very persuasive to show that a shipment is in transit so long as the carrier retains control over same, that is, from the time it issues a bill of lading for a shipment until it surrenders all possession and control to the ultimate consignee, or until its status has changed from carrier to warehouseman.

In the case of Brown v. Western Union Telegraph Company (S. C.) 67 S. E. 146, it is held that a telegraph message is in transit after it reaches its destination and is in the hands of the messenger boy.

What is the difference between the telegraph message in the hands of the telegraph boy and the shipment of freight in the hands of the railroad agent at destination?

In the case of Brown v. Western Union Telegraph Co. (supra) it was said:

> "A message is in transit, not only while it is being sent over the wires, but during the time it is in the hands of the messenger for delivery, after it reaches the place where the addressee resides; and there is no sound reason why the company should be liable when the agent in the State from which the message has been sent, or an agent along the line, is guilty of negligence, and yet not be liable for an act of negligence on the part of the messenger to whom the telegram is handed for delivery by the agent of the terminal office."

And why should the notice or filing of claim be dispensed with when there is a delay or damage while the shipment is actually moving over the rails, but required when the damage or loss is caused by the negligence of the agent at destination?

In other words, "in transit" as used in the proviso, means at any time after the property has been received by the initial carrier for interstate transportation and before the contract of carriage for the entire transportation is completely performed; and that the entire transportation includes delivery in accordance with the contract—which contract, of course, is assumed to be one which is valid under the statute.

Jennings etc. Co. v. Virginian Railway Co. (Va.), 119 S. E. 147.

See also opinion in this case by Supreme Court of Appeals of Virginia.

DOES THE PROVISO APPLY ONLY WHEN THERE IS ACTUAL PHYSICAL DAMAGE?

Petitioner takes the position that the proviso is only applicable when there is actual physical damage to the

shipment. This would, indeed, be a narrow construction of the statute. The contention is overruled by the decision in the case of Barrett v. Van Pelt, supra, wherein it was held that the carrier was liable for a decline in the market, when the shipment was delayed by the negligence of the carrier, and under such circumstances it was not necessary to file a claim.

See also New York etc. R. Co. v. Peninsula Produce Exchange, 240 U. S. 34, 60 L. Ed. 511.

In that case the court said that two questions were involved, the first of which was:

> "1. Does the Carmack Amendment (34 Stat. at L. 593, chap. 3591, Comp. Stat. 191338592) impose on the 'initial carrier' liability for delay occurring on the line of its connection without actual physical damage to the property?"

It was held that the carrier was liable for a loss on account of a decline in the market, the shipment having been delayed in transportation, although there was no physical damage to the shipment.

Compare Norfolk Truckers Exchange v. Norfolk Southern Railroad Company 116 Va. 466.

The proviso under construction is a part of Section 20 of the Interstate Commerce Act. We see no good reason why the words "loss, damage or injury" should be construed in one part of the section not to mean actual physical damage and in another part of the section to mean actual physical damage.

THE CASE AT BAR COMES WITHIN THE PROVISO AND NO NOTICE OR FILING OF CLAIM WAS NECESSARY.

We earnestly submit that, in this case there was a loss occurring in transit by the carelessness or negligence of the carrier.

There is no dispute as to the loss or damage to the shipment and the negligence is admitted. This would seem to be sufficient to sustain the judgment for the plaintiff.

We think that the case of Van Pelt v. (supra) governs the case at bar.

There have been several cases decided by the Courts directly in point with this case.

The case of Gillette Razor Co. v. Davis 278 Fed. 864 expressly holds that notice is not required when the loss or damage is caused by the carelessness or negligence of the carrier. In that case the shipment had arrived at destination and after it had been loaded on trucks it was stolen. The Court held that there was a loss or damage in transit, but as the theft was not due to negligence of the carrier, notice of claims was required. Here the negligence is admitted.

The case of Hailey, et al. v. Oregon Short Line R. R., 253 Federal, 569, holds that where an interstate shipment of horses was unnecessarily and carelessly held on the railroad yards at an intermediate point, notice of claim for loss was unnecessary. The Court in that case held that while the shipment was held in the railroad yards at an intermediate point, the shipment was in transit, and said:

> "If then, we take the only course open to us and give to the terms employed their com-

mon import, what is the result? To say that the phrase "in transit" is applicable only while a shipment is actually moving is to give to it an unusual and strained construction. Ordinarily a shipment is understood to be in transit from the point of origin until it reaches the point of destination. So long as it is in the course of being delivered to the place to which it is being shipped, it is in transit. A piece of baggage billed from New York to Boise is in transit all the time it is in the possession of the carrier for delivery at Boise—just as much as when it is upon a car standing at a station, pursuant to or awaiting orders, or upon a truck or station platform for transfer to another car, en route, as when it is upon a car moving 40 miles an hour. Not only would we do violence to the ordinary meaning of the phrase if we held that here it is to be understood as equivalent to 'while actually moving,' but such a construction would necessarily result in absurd distinctions. As to the duty of giving notice or filing a claim, why should a discrimination be made between the case of a collision, where the car carrying the shipment is standing on a siding, and one where it is moving on a siding? Nor, if we say 'in transit' is limited to cases where the shipment is actually in a car, is the construction any more defensible. No semblance of reason can be assigned for requiring notice if the freight is burned or stolen from a car, and at the same time relieving the shipper from such obligation if the theft or fire was in an adjacent freight depot. True, the phrase may sometimes be used in a narrow sense; but there is nothing here in the attendant language to suggest the exceptional use, and, to say the least, such a use would contribute nothing to the reasonableness of the

provision as a whole. The phrase is therefore to be understood in the sense in which it is commonly employed."

The case of Morrell v. Northern Pacific Ry. Co. (N. D.) 179, N. W. 922, is directly in point. In that case it was held that the provision in the shipping contract, requiring the shipper, as a condition precedent to the right to recover damages for delay in transit or for loss or injury to the shipment of stock, to give notice in writing of his claim within ninety days after delivery at destination, was not applicable in view of Section 8640-a Compiled Statutes United States.

In passing upon the question, on all fours with the one herein, the Court said:

> "The stipulation before us requires the giving of notice of claim within ninety days, after delivery of such stock at destination. From the facts established beyond a dispute it appears that the stock covered by the contract was never delivered at destination and that the recovery is based upon its non-delivery. The purpose of such a provision is doubtless to enable the carrier to investigate claims while this evidence is fresh, and thus to afford a means of protection against fraudulent and exaggerated claims. That it was not intended to shield carriers from liability occasioned by their negligence may well be inferred from the provisions of Section 8604-a Compiled Statutes U. S., 1918, which recognizes not only the right of carriers to require 90 days' notice of claims, but which further provides that—
>
> " 'If the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor

filing of claim shall be required as a condition precedent to recovery.'

"In the instant case it appears prima facie that the loss of the cattle was due to negligence, and it would therefore seem to be a case controlled by the proviso above quoted, wherein the carrier is prohibited from requiring notice as a condition precedent to recovery."

And further the Court said:

"For these reasons we are of the opinion that compliance with the stipulations requiring notice was not a condition precedent to the plaintiff's right of recovery."

The case of Morrell v. Northern Pacific Ry. Co. (supra) was a case of non-delivery, or failure to deliver, and as said by the defendant in his petition, Record page 7, "the wrongful delivery comes within the bill of lading category of failure to make delivery." In the case of a failure to make delivery, the loss or damage would be in transit. Therefore, to use the defendant's own words, the wrongful delivery being a failure to make delivery was loss of or damage to the shipment in transit.

The Supreme Court of North Carolina in the case of Mann v. Fairfield & E. C. Transportation Co., 96 S. E., 731, after quoting the proviso said:

"The verdict having established that the loss and damage complained of in the present instance was caused by the negligence of the connecting carrier, the plaintiff's claim comes clearly within the express terms of the statute, and the defendant is thereby deprived of any defense, which might arise from failure of plaintiff to give notice."

In the case of Scott v. American Railway Express Company 189 N. C., 377, a shipment of shoes was made from Milwaukee, Wis., to plaintiffs at Rose Hill, N. C. The shoes were never delivered to plaintiff. The claim was not filed within four months after a reasonable time for delivery had elapsed. The Court held that as there was a loss in transit by the carelessness of the carrier the plaintiff was excused from filing a claim.

In that case it was said:

> "It is suggested that there may be a valid reason for requiring notice of claim to be filed in case of total loss which does not exist in case of damage in transit by carelessness or negligence, in that the carrier has notice of the damaged condition of the goods while in its possession and at the time of delivery and might not have such notice of a total loss of a shipment in transit. This argument would seem to be without special merit, because it is a matter of common knowledge that all carriers, issuing bills of lading and express receipts, keep records of shipments made over their lines; and from such records, information of non-delivery is just as easily had as notice of negligent injury or damage in transit. There can be no difference in principle, as regards the duty to exercise diligence between the loss in transit by some negligent act of the carrier, resulting in the partial or total loss of said shipment."

Compare Winstead v. East Carolina R. Co. 186 N. C. 58; 118 S. E. 887.

LIABILITY OF CARRIER UNDER BILLS OF LADING ACT.

We are convinced that the judgment of the lower court must be affirmed on the authority of Barrett v.

Van Pelt supra. However, we consider the respondent's position strengthened by the terms of the Bills of Lading Act.

Attention is invited to the notice of motion and agreed statement of facts. The cause of action is laid for carelessly and negligently delivering the shipment without surrender of the bill of lading; and for the failure and refusal of the defendant to deliver the shipment to John L. Roper Lumber Company, the lawful holder of the bill of lading.

The Bills of Lading Act of Congress was approved August 29, 1916, being "An Act Relating to Bills of Lading in Interstate and Foreign Commerce," 39 Stat. L. 538. Section 7 thereof makes order bills of lading negotiable. Section 10 provides:

> "That where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to any one having a right of property or possession in the goods if he delivered them otherwise than as authorized by subdivision (b) and (c) of the preceding section * * *"

The preceding Section 9 provides that the carrier is justified in delivering the goods, subject to Sections 10, 11 and 12, to one who is:

> "(a) A person lawfully entitled to the possession of the goods, or
>
> (b) The consignee named in a straight bill for the goods, or
>
> (c) A person in possession of an order bill for the goods, by the terms of which the goods are deliverable to his order; or which has been endorsed to him, or in blank by the consignee, or by the mediate or immediate indorsee of the consignee."

The plaintiff, therefore, earnestly contends that as it is the lawful holder of the order bill of lading; that it is in possession of said order bill of lading, by the terms of which the goods are deliverable to its order; that the defendant delivered said shipment to one who was not lawfully entitled to the same; that the defendant is liable to plaintiff for the full value of the shipment under Section 10 of the Bills of Lading Act of Congress, and under such circumstances it was not necessary to file a claim.

THE JUDGMENT SHOULD BE AFFIRMED.

It is respectfully submitted:

(1). The plaintiff alleged negligence, and under the agreed statement of facts it was admitted that the shipment in question was delivered by the negligence of the carrier's agent, therefore, it was not necessary for the claim to be filed. The distinction as made by Congress was between the liabilities resulting from the carrier's negligence and those which rest upon a different basis, and, accordingly, Congress provided that a carrier could not require notice of claim for damages arising out of its own negligence.

(2). That as the shipment was wrongfully delivered without surrender of the original order bill of lading, and as the plaintiff is the lawful holder of said bill of lading, the liability of the defendant is absolute under the terms of the Bills of Lading Act of Congress.

Respectfully submitted,

CLAUDE M. BAIN,
Attorney for John L. Roper Lumber Company.

SUPREME COURT OF THE UNITED STATES.

No. 79.—October Term, 1925.

James C. Davis, Director General and Agent, Etc., Petitioner, *vs.* John L. Roper Lumber Company. } Certiorari to the Supreme Court of Appeals of Virginia.

[November 16, 1925.]

Mr. Justice Butler delivered the opinion of the Court.

There is here for review a judgment of the Supreme Court of Appeals of Virginia which affirmed a judgment of the Court of Law and Chancery against petitioner for $1,046.88. 138 Va. 377. June 24, 1918, at New Bern, North Carolina, respondent delivered to petitioner, then operating the Norfolk Southern Railroad, a carload of scrap iron for transportation over that line and connecting lines to Clarksburg, West Virginia. Petitioner issued a bill of lading, consigning the shipment to the order of respondent, "notify George Yampolsky at Clarksburg." It contained a clause requiring surrender of the bill of lading properly endorsed before delivery of the property; and provided that, "Claims for loss, damage or delay must be made in writing to the carrier . . . within six months after delivery of the property, or in case of failure to make delivery, then within six months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable." The shipment arrived at Clarksburg, July 15, 1918, and on that day was delivered to Yampolsky without surrender of the bill of lading and without the knowledge of the respondent, who at all times has been its lawful holder. No claim was made by respondent until March 5, 1920.

The Act of Congress of March 4, 1915 (known as the first Cummins Amendment), c. 176, 38 Stat. 1196, 1197, amending § 20 of the Act to Regulate Commerce, requires a common carrier receiving property for transportation in interstate commerce to issue a receipt or bill of lading therefor, and makes it liable to the holder for any loss, damage, or injury to such property, and contains these provisos: "*Provided further,* That it shall be unlawful for any such

common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: *Provided, however,* That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

There is presented the question whether this case is one in which the right of recovery may be made to depend upon the making of claim as required by the bill of lading. The provisos in § 20 have been recently considered by this court in *Barrett* v. *Van Pelt*, 268 U. S. 85. It was there pointed out that the purpose of the second proviso is to take some cases out of the general rule declared by the first proviso. And, in view of the inapt language and defective structure of the second, it was held that the word, "damaged" should be read, "damage", and that the comma after "unloaded" should be eliminated. It was also held that "carelessness or negligence" is an element in each case of loss, damage, or injury there named. The judgment now before us was given prior to that decision. The state court held that the damage resulting to respondent from the misdelivery occurred while the shipment was "in transit", within the meaning of the proviso, and that therefore the provision of the bill of lading requiring claim to be made was invalid. It said that "in transit" means at any time after the property has been received by the initial carrier and before delivery in accordance with the contract of carriage.

But that view cannot be sustained. The loss was due solely to misdelivery; that is, "a failure to make delivery" in accordance with the bill of lading. *Georgia, Fla. & Ala. Ry.* v. *Blish Co.*, 241 U. S. 190, 195. As construed by this court the second proviso embraces three classes: (1) loss, damage, or injury due to delay, (2) damage while being loaded or unloaded, (3) damage in transit. Clearly, misdelivery is not in the first or second class. And, unless it is in the third class, the proviso does not apply. The context shows that the phrase, "in transit", was not intended to have the broad meaning attributed to it by the state court. In the proviso, claims on account of damage "while being loaded or unloaded" are

separate and distinct from those for "damage in transit". The creation of the former class would be wholly unnecessary and inappropriate if the latter is to be taken to include both classes. Loading precedes, and unloading follows, transit. In the ordinary and usual meaning of the word, "transit" ends before delivery at destination. Misdelivery is not mentioned in the proviso; and the language used is inconsistent with and negatives any intention to include claims for damages on account of misdelivery in the class defined as "damage in transit."

Respondent contends that under § 10 of the Bills of Lading Act, c. 415, 39 Stat. 538, 540, it was not necessary to comply with the requirement of the bill of lading. The point is without merit. That section provides: "Where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to anyone having a right of property or possession in the goods . . ." The rule of liability so declared is not inconsistent with the second proviso in § 20, which relates merely to the enforcement of liability. The provisions of both acts are to be read together, and applied in harmony with the bill of lading. More than nineteen months elapsed before respondent made any claim. There is nothing in the statutory provisions relied on by respondent to excuse its failure to make claim within the time specified in the shipping contract.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

A true copy.

Test:

Clerk, Supreme Court, U. S.